In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SHULTZ, SECRETARY OF THE TREASURY; S. S. SOKOL, COMMISSIONER, OF ACCOUNTS, PETITIONERS

v.

WILLIAM B. RICHARDSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX TO APPENDIX *

* The district court's opinion is reproduced as an appendix to the petition for certiorari, Pet. App. B, pp. 55a-58a. The opinion of the Court of Appeals is reproduced at Pet. App. A, pp. 1a-53a.

Relevant Docket Entries

1970	
Jan 8	Complaint filed.
Jan 16	Order denying three judge court, and directing assignment in usual manner.
Mar 20	Motion to Dismiss filed by Defendants.
Apr 22	Motion opposing three judge court filed by Defendants with memorandum attached.
May 19	Motion to convene three judge court without further oral or written argument filed by Plaintiff.
May 19	Motion to quash Motion in Opposition to convening three judge court filed by Plaintiff.
Jun 15	Hearing on Motion to Dismiss held before Willson, J.
Jun 16	Memorandum filed and Order entered dismissing Plaintiff's complaint.
Aug 14	Notice of Appeal filed.

[Complaint]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

WILLIAM B. RICHARDSON,
PLAINTIFF

VS.

UNITED STATES OF AMERICA; DAVID M. KENNEDY, Secretary of the Treasury for the UNITED STATES; and S. S. SOKOL, Commissioner of Accounts for the Secretary of the Treasury, UNITED STATES Government,
DEFENDANTS

Civil Action Number
70 23

I. GENERAL LEGAL ALLEGATIONS

A. *On Jurisdiction*

(1.) Jurisdiction is founded on Article III, Section 2, Clause (1), of the United States Constitution and the laws of the United States as follows:

title 28 U.S.C.A. sect 1346(a)(2)
—based on Constitution.
title 28 U.S.C.A. sect 1361
—mandamus to compel agency.
title 5 U.S.C.A. sect 701 thru 704
—review of agency action.
title 5 U.S.C.A. sect 552(a)(3)
—enjoin agency.

B. *On Basis of Action*

(2.) The action arises under the Constitution of the United States; the non-jurisdictional portions of that Constitution giving basis to this complaint are:

Article I Section 3 Clause (4)
—Vice-President—Duties.

Article I Section 7 Clause (2)
—Definition of "Law".
Article I Section 8 Clause (1)
—Taxing and Spending.
Article I Section 8 Clause (12)
—Military Appropriation Limits.
Article I Section 8 Clause (14)
—Land and Naval Forces.
Article I Section 9 Clause (7)
—Appropriation and Accounting.
Amendment I (Bill of Rights)
—Freedom of Speech and Press.

(3.) The action arises under the laws of the United States relative to the National Security as follows:

title 50 U.S.C.A. sect 401
—declaration of purpose
title 50 U.S.C.A. sect 402
—National Security Council
title 50 U.S.C.A. sect 403
—Central Intelligence Agency
title 50 U.S.C.A. sect 403a
—CIA Act—definitions
title 50 U.S.C.A. sect 403b
—CIA Act—Judicial Notice
title 50 U.S.C.A. sect 403c
—CIA Act—procurement
title 50 U.S.C.A. sect 403f
—CIA Act—general authority
title 50 U.S.C.A. sect 403j
—CIA Act—appropriation authority

(4.) This action is suggested in part by criminal code title 18 section 1001 in-so-far as that statute proclaims governmental policy but the defendant, UNITED STATES OF AMERICA, has countered its own policy directives through unconstitutional legislation exonerating the natural defendants in this case. No further reference to this statute is set out in this complaint.

(5.) This action arises under the Code of Federal Regulations, title 31 section 270.3(a)(b) in-so-far as it supplements the Administrative Procedure Act cited para (1.)

above (title 5 U.S.C.A. 701 et seq.) and defines final agency action in regard to requests for records from the Commissioner of Accounts.

C. *Nature of Proceeding*

(6.) This is a proceeding for an Injunction pursuant to the provisions of title 5 U.S.C.A. section 552(a)(3), title 28 U.S.C.A. section 2282, and title 28 U.S.C.A. section 2284; for a Mandamus pursuant to title 28 U.S.C.A. section 1361; and for a Declaratory Judgment pursuant to the provisions of title 28 U.S.C.A. 2201 and 28 U.S.C.A. 2202.

II. Plaintiff

(7.) Plaintiff is a resident of Greensburg, Pennsylvania, a member of the electorate, and a loyal citizen of the United States. He is furthermore a taxpayer paying Federal income taxes and other Federal taxes.

III. Defendants

(8.) The defendants are:

a. the limited sovereign, UNITED STATES OF AMERICA, who has consented to be sued by statutory enactment.

b. the Secretary of the Treasury for the sovereign defendant, Mr. DAVID M. KENNEDY, with offices in Washington, D.C. As Secretary of said Treasury, this defendant is head of the depository for all public money held by the Federal Government and is bound by Federal laws to honestly and faithfully account for all receipts and expenditures as prescribed by the Constitution.

c. the third defendant is Mr. S. S. SOKOL, Commissioner of Accounts, Fiscal Service, United States Treasury, with offices in Washington, D.C. who has been delegated responsibility for honest and faithful reporting of the receipts and expenditures of all public money and who represents that his department publishes the document required by Article I, Section 9, Clause (7) of the United States Constitution.

IV. Statement of Case

A. *Background Information*

(9.) On May 12, 1967, the plaintiff wrote the Government Printing Office saying that he desired to obtain the documents published by the Government in compliance with Article I Section 9 Clause (7) of the United States Constitution. Under date of August 9, 1967, a reply was received from the Treasury Department, Fiscal Service, Bureau of Accounts explaining that they produced this document and that "This report is now known as the 'Combined Statement of Receipts, Expenditures, and Balances of the United States Government'" (attached to this letter were copies of the monthly and daily reports. Examination of these reports showed no listing for the operation of the CIA). This letter was signed by H. A. TURNER, Deputy Commissioner for Central Accounts and Reports. The plaintiff wrote Mr. TURNER on August 21st, 1967 and quoted part of the CIA Act and enquired if this did not operate "to cast reflection upon the authenticity of the Treasury's statement?" Also, the plaintiff enquired how he could receive the expenditures of this Agency. Under date of August 24th, 1967, Mr. TURNER replied saying that plaintiff had only quoted a part of the Act and directing plaintiff's attention to further subsections to be read and stating in conclusion: "We have no other information available with respect to the Agency mentioned in your letter." On September 25th, 1967, the plaintiff wrote Mr. TURNER setting out essentially that (1) the Constitutional mandate was clear (2) that the report of the Treasury should include all public money (3) that such report should be published for the benefit of the public (4) that if their reports are to be represented as complying with Article I Section 9 Clause (7) of the Constitution, they should immediately terminate their present methods of reporting, and (5) that they should present the matter to the Attorney General for a determination as to what should be published.

(10.) Under date of October 24th, 1967, Mr. S. S. SOKOL, Commissioner of Accounts, Fiscal Service, Treasury Department, replied to plaintiff's letter of September 25th saying that they would not cease publication of their docu-

ments and explaining that once a statute was on the books, he was prohibited by established practice from requesting an opinion as to its constitutionality. Further, Mr. SOKOL stated: "All the receipts and expenditures of the Government are published in the Secretary's reports; however, by statute, the details of receipts and expenditures for the above Agency (CIA) are not available."

B. *Statement on Constitutional Repugnance*

(11.) The plaintiff cannot obtain a document that sets out the expenditures and receipts of the Central Intelligence Agency including the amounts appropriated for this Agency; instead, he is asked to accept a fraudulent document. The Treasury Department's action is final agency action on his demands. Upon authority of the United States Constitution, he is entitled to ask for and receive a reliable publication that makes sense from the accounting standpoint.

(12.) The Central Intelligence Agency Act is repugnant to the Constitution of the United States in several ways which will be shown; but primarily, and most prominently, it operates to falsify the Regular Statement and Account of All Public Money. For the Government to spread the appropriations, receipts and expenditures of this Agency throughout a document diabolically titled to resemble the wording of Article I Section 9 Clause 7 and then represent it as complying with the Constitution is a misrepresentation inconsistent with responsible government. This is especially shocking when the government exists only by virtue of a social contract where-in the People have relinquished certain powers in the form of delegated authority none of which included the authority to commit fraud on them. The only logical conclusion that can be drawn from such behavior is that the Federal Government views the American People as a potential enemy against whom the Government must be protected at all cost.

(13.) No one wants to destroy the Central Intelligence Agency; or even curtail its activities in the area of coordination, correlation, collection, evaluation and dissemination of Intelligence if these are the only areas within which the Central Intelligence Agency operates; and, accordingly, there would be no need to usurp Constitutional authority.

It should be a relatively simple matter to write legislation allowing ample flexibility of operation, protection of intelligence sources and methods, reporting under Article I Section 9 Clause (7), and for imposition of stringent rules and regulations to safeguard American ideals.

(14.) Besides the irregular accounting engendered by the CIA Act, the Federal Government has no authority to create a para-military organization and give it perpetual funding; no authority to create and fund a para-military organization over which it has relinquished the rule-making responsibilities associated with the land and naval forces; nor can it provision such an organization with "personal services, including personal services without limitations on types of persons to be employed ——" and "purchase, maintenance, operation, repair —— aircraft, and vessels of all kinds."

(15.) Furthermore, the Federal Government does not have the authority to create an organization, fund it clandestinely, and empower it to purchase news reporting services. The temptation for ambitious men to use such unprecedented power as a weapon of intimidation to stifle free speech and freedom of the press is too great.

(16.) If it is assumed that the document produced by the Treasury Department and titled "Combined Statement of Receipts, Expenditures and Balances of the United States Government" is intended by the Government to be the fulfillment of Article I Section 9 Clause (7) (and this is what they represent it to be); then, the following situation exists with regard to CIA funding:

a. Such funding and reporting practices prevent the receipts and expenditures of the Central Intelligence Agency from becoming available to the producer of what should be the Regular Statement and Account of the Receipts and Expenditures of All Public Money and forces on the People an irregular statement and account.

b. Such funding and reporting practices authorize collusion between the Central Intelligence Agency, the Bureau of the Budget and "other agencies" to transfer public money in such a manner that certain so-called receipts and expenditures of the "other agencies" are transfers to and from the Central Intelli-

gence Agency and not, in fact, receipts and expenditures of those "other agencies."

c. Such funding and reporting practices authorise depositories of public money within other agencies that draw on the Treasury to insulate the Central Intelligence Agency from any record of having drawn public money from the only Constitutional depository of record within the Federal system as far as the People are concerned.

d. Such funding and reporting practices promote double dealing in government finance by taking money drawn from the Treasury "in consequence of appropriations made by law" which is limited in use to the mission of the drawing agency then transferring this money to the Central Intelligence Agency without limitation on spending and without accountability.

e. Such funding and reporting practices undermine public confidence in the Government's ability to produce a regular statement and will eventually be calamitous.

(17.) There are additional Constitutional repugnancies associated with the National Security Statutes which adversely affect funding and spending. These are stated and clarified under part F (Statement on Declaratory Findings).

On Statement on Federal Taxpayer's Suit

(18.) The plaintiff is taxed by the laws of the United States on income and through other forms of taxation. The money extracted from him should be deposited in the Treasury of the United States under the direction and control of the defendant KENNEDY. This defendant has no authority to release money from the Treasury except "in consequence of appropriations made by law." When an appropriation establishes a credit in the Treasury for a particular agency, that agency and no other can draw on that credit. The Congress has no authority to pass statutes that countermand Constitutional mandates. It is obvious from simple reading of the statutes on the National Security (cited: page #1 this complaint, para. (3)) that certain mandates incorporating specific limitations and restraints on the spending power have been breached.

(19.) The Congress has exceeded its taxing and spending power under Article I Section 8 of the Constitution. In addition, the laws relative to the National Security cited in paragraph (3.) page #1 of this complaint exceed specific constitutional limitations and restraints on the taxing and spending power. These specific limitations and restraints are further described and clarified in part F (Statement on Declaratory Findings), paragraphs (26.) through (54.).
(20.) Accordingly, the taxpayer's money is being extracted and spent in violation of specific Constitutional protections against such abuses of legislative power and such an injury is appropriate for judicial redress.

D. *Statement on Duty Owed the Plaintiff*

(21.) Defendant SOKOL has been delegated the authority to prepare and publish for public consumption the report ordered by Article I Section 9 Clause 7 of the United States Constitution. Defendant SOKOL does not publish the report as required by the Constitution but represents that he does. Defendant SOKOL refuses to take any steps to bring his report up to the standards required by the Constitution and he relies on unconstitutional statutes as his authority which, he says, he cannot question once the statutes are on the books.
(22.) The Commissioner of Accounts is duty bound to deliver to the plaintiff a document that complies with Article I Section 9 Clause (7) of the Constitution. Accordingly, the plaintiff has been denied a Constitutional right arising from deliberate actions of his Government in passing legislation purposely designed to defeat the Constitutional mandates.
(23.) Wherefore, the plaintiff can maintain this action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff and such an action will have judicial cognizance.

E. *Statement on Appeal from Final Agency Action*

(24.) Part A (Background Information) of this section titled "Statement of Case" gives a resume of plaintiff's written demands on the Commissioner of Accounts and the

Commissioner's reaction thereto. Significant among these demands were (1) that plaintiff desired the expenditures of the Central Intelligence Agency, and (2) that the Commission's non-compliance with the Constitutional mandate was so flagrant that the Commission should immediately discontinue production of their reports until the matter was thrashed out within the Executive Departments and all public money properly accounted for and/or reported. The Commissioner's reply was to deny, in effect, that the document he produced transgressed the Constitutional directives and that he could do nothing further in the absence of a court ruling. This amounted to final agency action as described in title 31 section 270.3(a)(b) of the Code of Federal Regulations headed "Availability of Records" and is specifically applicable to the Commissioner of Accounts when requests for records are denied by him.
(25.) Accordingly, the plaintiff has suffered legal wrong because of agency action and is entitled to judicial review and corrective action.

F. *Statement on Declaratory Findings*

WHEREFORE, the plaintiff demands that the Court adjudge:
(26.) That Congress and the President, like the courts, possess no power not derived from the Constitution and the United States is entirely a creature of the Federal Constitution; its power and authority has no other source and it can only act in accordance with all the limitations imposed by the Constitution.
(27.) That the rights and liberties of citizens of the United States are not protected by custom and tradition alone, they are preserved from the encroachment of government by express provisions of the Federal Constitution.
(28) That the language of the Federal Constitution where clear and unambiguous must be given its plain evident meaning.
(29.) That the prohibitions of the Federal Constitution are designed to apply to all branches of the National Government and they cannot be nullified by the Congress and the Executive combined.
(30.) That Article I Section 9 Clause (7) of the Constitution of the United States acts as a limitation and restraint

on the taxing and spending clause of that Constitution.

(31.) That Article I Section 9 Clause 7 incorporates by reference Article I Section 7 Clause 2 of the United States Constitution and the two articles act as a limitation on the taxing and spending clause specifically requiring that no money shall be drawn from the Treasury except on authority of a Bill of Appropriation passed by both houses and signed by the President or passed over his veto and setting forth the amount of appropriation, the name of the government agency to be credited by the Treasury, and the time period during which the credit shall be available to the agency.

(32.) That Article I Section 8 Clause 12 acts as a limitation on the taxing and spending clause and, acting in conjunction with Article I Section 9 Clause 7 and Article I Section 7 Clause 2, limits the appropriation of money to raise and support armies to a bill duly passed by both houses and signed by the President or passed over his veto; and said bill cannot appropriate such money beyond a two year period.

(33.) That the Freedom of Speech and Freedom of the Press provisions of Amendment I act as a limitation and restraint on the taxing and spending provisions of Article I Section 8 Clause I and specifically deny the Federal government any right to authorize undisclosed and indiscriminate rental of news reporting by any agency of government; such abuse of the Bill of Rights would be further magnified if such rental funds were unlimited and unaccounted for.

(34.) That a receipt of public money occurs at any time a government agency receives credit in its Treasury account for funds based upon a Bill of Appropriation. This is a checking account established for that agency. Thus, Article I Section 9 Clause (7) meant that all appropriations were to be reported in the "regular statement and account of the receipts and expenditures of all public money;" such report to be by heads of appropriation whose access to public money is based only on the credit accrued in their Treasury account.

(35.) That an expenditure of public money means a laying out of public funds in a transaction following which that money is no longer public money. Thus, the transfer of

public money from one government agency to another does not constitute an expenditure and should not be reported as such in any document purporting to be published in compliance with Article I Section 9 Clause 7.

(36.) That it was the intent of Article I Section 9 Clause (7) to make available to every United States citizen a regular statement and account of the receipts and expenditures of all public money published by an instrument of government having a thorough knowledge of the flow of public money in and out of the Federal structure and having indisputable access to all receipts and expenditures where public money is concerned.

(37.) That it is a condition attached to the use of public money by a government agency that its receipts and expenditures shall be available to the instrument of government producing the statement and account required by Article I Section 9 Clause (7) and no agency can be the subject of government classification, security or otherwise, that would prevent its inclusion. Furthermore, legislation is inherently defective that orders the courts to take judicial notice of the existence of an Agency and at the same time orders the Treasury Department to treat the same Agency as though it did not exist.

(38.) That the annual document titled "Combined Statement of Receipts, Expenditures and Balances of the United States Government" prepared by the Treasury Department and offered for sale by the Government Printing Office is not, in fact, the document required by Article I Section 9 Clause 7 of the United States Constitution but is represented by the Government as identical.

(39.) That no document is now being published for information of the People that meets the requirements of Article I Section 9 Clause 7.

(40.) That failure to publish a regular statement and account of the receipts and expenditures of all public money and make it available to the People and to the plaintiff is a mockery of delegated authority and a violation of plaintiff's constitutional rights when he demands such a document from his Government.

(41.) That when the Government produces a document purporting to be a constitutionally founded document giving a regular statement and account of all public money and

setting out the appropriations, receipts and expenditures as they relate to each government agency but in correspondence they admit that there is one Agency which receives and spends public money but which they have no information on, then their document is fraudulent as to the People for whom it is prepared especially when the appropriations, receipts and expenditures of the renegade Agency are spread throughout the entire document allegedly complying with Article I Section 9 Clause (7).

(42.) That it was never intended by the Founding Fathers that appropriations, receipts and expenditures of the United States Government were to be reported in any other manner than in a manner that made sense.

(43.) That subterfuge can play no part in drawing money from the Treasury nor in producing the regular statement and account of the receipts and expenditures of all public money.

(44.) That when the plaintiff is tendered a document held out as complying with Article I Section 9 Clause (7) but in fact it is a spurious document clearly abrogating the Constitutional requirement, then this is a fraud practiced on the plaintiff and a violation of his Constitutional rights.

(45.) That the provision in 50 U.S.C.A. section 403f(a) stating: "and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations" is countermanding of Article I Section 9 Clause 7 and Article I Section 7 Clause 2 and is an affront to the American People since it serves no useful purpose except to deceive everyone including those desiring, and entitled to, an honest accounting of public money.

(46.) That the wording in the Central Intelligence Agency Act (50 U.S.C.A. sect. 403f(a)) to the effect: "Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a-403j of this title without regard to limitations of appropriations from which transferred;" constitutes an unlawful delegation of governmental authority because there is no such thing as an "unlimited appropriation" and any attempt to so fund a government agency is repugnant to both Article I Section 9 Clause (7) and Article I Section 7 Clause (2).

(47.) That the statement as to appropriations in title 50 U.S.C.A. 403j(b): "The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds" repeals all laws governing the expenditure of public money in the hands of this one Agency and is self-incriminating and unworthy of comment.

(48.) That the statement "and for objects of a confidential, extra-ordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified" is too broad and comprehensive and is giving this Agency more power than the Federal Government itself has—being specifically repugnant to Article I Section 9 Clause 7 of the Constitution. The interpretation of this provision has resulted in nothing being reported.

(49.) That the CIA Act (50 U.S.C.A. section 403f(a)) is repugnant to the United States Constitution wherein it states that "the Central Intelligence Agency is authorized to—(a) Transfer to an receive from other Government agencies such sums as may be approved by the Bureau of the Budget—" because such sums could be transferred from collection agencies thus circumventing entirely the Treasury of the United States; furthermore, the delegation of such authority to the Bureau of the Budget to accommodate the funding of the Central Intelligence Agency so that this Agency never appears on the regular statement and account of all public money and has perpetual appropriation status is a deliberate fraud on the People of the United States and permits the Bureau of the Budget to operate outside the narrow lines of governmental authority delegated to the Federal Government by the People of this Country being especially repugnant to Article I Section 9 Clause 7, Article I Section 7 Clause 2, Article I Section 8 Clause 12, and Article I Section 8 Clause 14.

(50.) That the power granted to Congress by Article I Section 8 Clause 14 of the Federal Constitution to make rules for the government and regulation of the land and naval forces does not extend to civilians. Thus, Congress has delegated authority in the CIA Act to the Executive for an organization which, in some operations, is paramilitary, over which Congress makes no rules for its gov-

ernment and regulation and to attempt to fund such an Agency is ultra vires the Constitutional authority of Article I Section 8 Clause 1 because Article I Section 8 Clause 14 limits spending to those organizations composing the land and naval forces when the rules and regulations for such organizations are made by Congress.

(51.) That the Central Intelligence Agency is, in part, a para-military organization and that it is an unlawful delegation of legislative authority and a violation of Article I Section 8 Clause 12 of the United States Constitution to automatically fund this Agency on a continuing basis without regard to the 2 year limitation on such funding.

(52.) That the Central Intelligence Agency is, in part, a para-military organization and that it is an unlawful delegation of legislative authority and a violation of Amendment I of the Bill of Rights to give such an organization automatic funding without limitation or accountability for the undisclosed and indiscriminate "rental of news reporting services" such being in derogation of the Freedom of Speech and Freedom of the Press provisions.

(53.) That it is an unlawful incorporation by reference to write-in the Central Intelligence Agency as an additional participant under the "Armed Services Procurement Act of 1947" (Public Law 413, Eightieth Congress, second session) by making reference to said Act and the relationship thereto of the Central Intelligence Agency in "The Central Intelligence Agency Act of 1949" (Public Law 110, 81st Congress, title 50 U.S.C.A. sect 403c). That notwithstanding, this procedure was adopted, but subsequently, the "Armed Services Procurement Act of 1947" was repealed and replaced by the Act of August 10, 1956 "Procurement Generally" (title 10 U.S.C.A. 2301 through 2314) and the subsequent Act has never been incorporated by reference, or otherwise, into the CIA Act; accordingly, the CIA is without any restriction as to its procurement procedures; therefore, the People of this Country are confronted with the untenable situation of a secret organization with unlimited access to the United States Treasury, statutorily protected from accountability, with the funding system rigged for fraudulent appropriation and accounting of public money, and running wild as far as procurement procedure is concerned.

(54.) That the Vice Presidency of the United States is a Constitutionally ordained office. The duties are prescribed by the Constitution. No other duties can be assigned this office. As a practical matter, the Vice-President is not a member of the Executive nor of the Legislature and is not subject to assignment by either. To assign such an elected official to an Executive post on the National Security Council where he can exercise certain control over the expenditures of an organization with unlimited funding and no accountability violates Article I Section 3 Clause (4) of the Constitution in that he is assigned to duties not prescribed by the Constitution and may vote on appropriations which he later takes part in spending.

(55.) That the Vice President of the United States is elected as a member of the Executive but, once in office, he is assigned the duty of presiding over the Senate. After taking office, he is constitutionally bound to work in the legislature. There he is "buried", so to speak, and he is only resurrected in the Executive Branch should the President become incapacitated. By putting the Vice President on the National Security Council, which is purely an instrument of the Executive Department, the Government is breaching the Separation of Powers doctrine.

V. Prayer for Relief

(56.) Wherefore, plaintiff respectfully prays that upon the filing of this complaint this Court give precedence over all other cases on the docket except as to causes the Court considers of greater importance and this case to "be assigned for hearing and trial at the earliest practicable date and expedited in every way" as prescribed in title 5 U.S.C.A. section 552(a)(3) and that a three Judge Court be especially convened to:

(a.) adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment;

(b.) issue a mandamus compeling the defendants to perform their duty to the plaintiff as prescribed by the United States Constitution.

(c.) issue a permanent injunction enjoining the defendants from publishing their "Combined Statement of Re-

ceipts, Expenditures and Balances of the United States Government" and representing it as the fulfillment of the mandates of Article I Section 9 Clause 7 until same fully complies with those mandates.

(d.) grant plaintiff such other, additional or alternative relief as may appear to the Court to be equitable.

(e.) grant plaintiff his costs herein.

/s/ William B. Richardson
WILLIAM B. RICHARDSON
149 Westmoreland Avenue
Greensburg, Pennsylvania 15601

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

Civil Action No. 70-23

MOTION TO DISMISS

[Filed March 20, 1970]

And now comes the United States of America by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, and Thomas A. Daley, Assistant United States Attorney, and moves the Court to dismiss the captioned action for the following reasons:

1. The action is barred by the principles of "res judicata" and "law of the case", the plaintiff having previously brought the action in this Court, and judgment of dismissal having been entered against him, Miller, J., 285 F. Supp. 866, aff'd., 409 F.2d 3 (3d Cir. 1969).
2. The plaintiff lacks standing to bring the action.
3. No justiciable controversy is presented by the complaint.
4. The complaint fails to state a cause of action upon which relief can be granted.
5. The Court lacks jurisdiction.

RICHARD L. THORNBURGH
United States Attorney

/s/ Thomas A. Daley
By: THOMAS A. DALEY
Assistant United States Attorney

SUPREME COURT OF THE UNITED STATES

No. 72-885

UNITED STATES, ET AL.,
PETITIONERS,

v.

WILLIAM B. RICHARDSON

ORDER ALLOWING CERTIORARI. Filed February 26, 1973.
The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U.S. Government Printing Office: 1973—497-594/372

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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA; GEORGE P. SHULTZ, SECRETARY OF THE TREASURY; S. S. SOKOL, COMMISSIONER OF ACCOUNTS, PETITIONERS

v.

WILLIAM B. RICHARDSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, the Secretary of the Treasury, and the Commissioner of Accounts, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–53a) is reported at 465 F. 2d 844. The opinion and order of the district court (App. B, *infra*, pp. 55a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972. On October 11, 1972, Mr. Justice

Brennan extended the time for filing a petition for a writ of certiorari to and including December 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, clause 7 of the Constitution provides as follows:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

50 U.S.C. 403f(a) provides as follows:

> In the performance of its functions, the Central Intelligence Agency is authorized to—
>
> Transfer to and receive from other Government agencies such sums as may be approved by the Office of Management and Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to

the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a to 403c, 403e to 403h, and 403j of this title without regard to limitations of appropriations from which transferred;

50 U.S.C. 403j(b) provides as follows:

> The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified.

31 U.S.C. 1029 provides as follows:

> It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures by each separate head of appropriation.

STATEMENT

Respondent Richardson brought this action as a citizen and taxpayer seeking to enjoin the publication, by the Secretary of the Treasury, of the "Combined Statement of Receipts, Expenditures, and Balances of the United States Government" required by 31 U.S.C.

1029.[1] The complaint alleged that the Statement does not identify appropriations for and expenditures by the Central Intelligence Agency ("C.I.A."), and thereby violates Article I, section 9, clause 7 of the Constitution insofar as that clause requires a regular statement and account of public funds. Respondent requested the convening of a three-judge court to consider the constitutionality of the provisions of the Central Intelligence Agency Act which authorize the agency to receive funds from other agencies and expend those funds on the certification of the director (App. A, *infra*, pp. 5a–6a).[2]

The district court refused to convene a three-judge court and dismissed the complaint (App. B, *infra*, pp. 55a–58a). The court held that respondent did not

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[1] Respondent previously filed an identical suit which was dismissed by the district court on standing grounds. *Richardson* v. *Sokol*, 285 F. Supp. 866 (W.D. Pa.). The Third Circuit affirmed that decision on the ground that respondent had failed to allege that $10,000 was in issue and denied leave to amend the complaint (409 F. 2d 3), and this Court denied a petition for a writ of certiorari (396 U.S. 949). Respondent refiled the suit alleging a variety of jurisdictional bases other than 28 U.S.C. 1331, and the court of appeals held that 28 U.S.C. 1361 (giving district courts jurisdiction of actions to compel federal officers to perform a duty owed to plaintiff) provided jurisdiction (App. A, *infra*, pp. 6a–10a).

[2] Congress enacted 50 U.S.C. 403f(a) and 403j(b) to provide "for the annual financing of Agency operations without impairing security." S. Rep. No. 106, 81st Cong., 1st Sess., p. 4. A committee of Congress oversees C.I.A. financing, and approval by the Office of Management and Budget is necessary before other agencies may transfer funds to the C.I.A. Because funds are not appropriated to the agency, the Combined Statement which reports "expenditures, by each separate head of appropriation" (31 U.S.C. 1029), does not reflect C.I.A. expenditures.

have standing as a taxpayer under *Flast* v. *Cohen*, 392 U.S. 83, and alternatively that the details of funding C.I.A. activities presented a political question.

The court of appeals, sitting *en banc*, reversed with three judges dissenting. It held that respondent had standing as a taxpayer to challenge the constitutionality of the Central Intelligence Agency Act (App. A, *infra*, pp. 10a–16a). The court refused to reach the political question issue, believing it so "intertwined with the merits of the case" that it should be considered by the three-judge court, which it directed to hear the case on remand (App. A, *infra*, p. 20a).[3]

On the standing issue, the majority reasoned that respondent satisfied the criteria of *Flast* v. *Cohen*, *supra*.[4] Although conceding that the nexus between respondent's status as a taxpayer and the enactment challenged here is different from that between the taxpayer and the enactment challenged in *Flast*, the court concluded that *Flast* was not limited to challenges to appropriations. It held that

> the nexus between a taxpayer and an allegedly unconstitutional act need not always be the appropriation and the spending of his money for an invalid purpose. The personal stake may come from any injury in fact even if it is not directly economic in nature.

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[3] The district court has granted a stay of respondent's motion to convene a three-judge court, pending disposition of this petition for a writ of certiorari. On September 26, 1972, the Third Circuit denied respondent's petition for mandamus to compel the immediate convening of a three-judge court.

[4] Chief Judge Seitz concluded that respondent had no standing as a taxpayer, but voted with the majority on the ground that he had standing as a citizen (App. A, *infra*, p. 13a, n. 8).

(App. A, *infra*, pp. 13a–14a). The court found such "injury in fact" in the frustration of respondent's desire to know how his tax money is spent.

The court further reasoned that the second part of the test in *Flast* was met, since, it believed, Article I, section 9, clause 7 was a specific limitation upon the taxing and spending power of Congress, although it recognized that the clause is not a substantive limitation but "is procedural in nature" (App. A, *infra*, pp. 14a–15a).

The three dissenting judges, after an extended analysis of the standing concept, concluded that the relevant considerations under *Flast* and other decisions were as follows:

> Is the constitutional right asserted of such paramount importance so as to obviate the need to allege and prove direct personal impact which is individualized as distinguished from an impact shared by every member of the body politic? If not, does the plaintiff allege a direct personal injury or impact caused by the violation of the asserted constitutional right?

(App. A, *infra*, p. 48a). The dissenters would have held that Article I, section 9, clause 7 was not of such paramount constitutional importance that "the traditional requirements of standing should be waived" (App. A, *infra*, p. 50a), and that plaintiff did not allege the necessary direct personal injury.[5]

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[5] The case was initially argued before a panel consisting of two circuit judges and a district judge sitting by designation. After a second round of briefs, the court *sua sponte* determined to hear the case *en banc* without further argument. The district judge on the original panel sat *en banc*. We believe this

REASONS FOR GRANTING THE WRIT

This case presents an important question regarding the standing of taxpayers to challenge allegedly unconstitutional congressional action. The conclusion of the court of appeals that a taxpayer has standing to litigate wherever he alleges any "injury in fact" cannot be squared with this Court's decision in *Flast* v. *Cohen*, 392 U.S. 83, and goes far beyond the limited concept of standing there recognized. The decision below, if allowed to stand, is almost certain to spawn a significant increase in suits by taxpayers challenging a wide variety of government programs and a significant number of Congressional statutes. Such a major expansion of the standing test calls for review by this Court.

1. This Court held in *Flast* that the absolute prohibition against taxpayer suits challenging the constitutionality of statutes enunciated in *Frothingham* v. *Mellon*, 262 U.S. 447, should be modified in a narrowly defined situation where taxpayers can demonstrate a particular type of interest in the legislation chal-

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was improper, since, under 28 U.S.C. 46(c) the court *en banc* consists only of circuit judges in active service and any retired circuit judge who participated in the original hearing. Cf. *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 688–691. Indeed, the purpose of *en banc* decisions, to permit all active circuit judges to decide an important question that will control in the circuit (*id.* at 689–690), is inconsistent with permitting a district judge to participate in that process. We believe, however, that the error was harmless in this instance, since the district judge voted with the majority of five circuit judges. Although one of these five disagreed on the basis for the holding (see note 4, *supra*), the result without the district judge's vote would still have been the same.

lenged. The nature of the interest required was carefully identified (392 U.S. at 102–103):

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. * * * Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

In so holding, the Court reaffirmed that a taxpayer may not "employ a federal court as a forum in which to air his generalized grievances about the conduct of government * * *." *Id.* at 106.

Although respondent relies primarily upon his status as a taxpayer, his suit is not directed at exercises of congressional power under the taxing and spending clause. The allegations are not that appropriations are being spent for constitutionally impermissible purposes, but that the appropriation process violates the Constitution because of the manner in

which certain appropriations are labeled and reported.

Since the taxing and spending power is not involved, the nexus required by *Flast* between the taxpayer's status and the action he complains of is absent. See *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa.), affirmed, 401 U.S. 901; *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176 (D.N.J.). Respondent claims no injury to his purse but rather that the provisions of the C.I.A. Act permitting secrecy are "generally beyond the powers delegated to Congress." *Flast*, *supra*, at 103. These are merely "generalized grievances about the conduct of government," which *Flast* indicates are not enough to confer standing.

Moreover, respondent cannot demonstrate the second aspect of the nexus required by *Flast*, that the statute challenged exceeds a specific constitutional limitation of the congressional taxing and spending power. The allegation of the inconsistency of the Act with Article I, section 9, clause 7 is not sufficient. Unlike the Establishment Clause, which *Flast* found to be a specific limitation, Article I, section 9, clause 7 does not limit the congressional taxing and spending power, and does not secure fundamental rights in which all taxpayers have an equal, direct and personal interest.

Instead, this clause means only that no money can be paid from the Treasury unless first appropriated by Congress and reported in accord with that appropriation. See, *e.g.*, *Reeside* v. *Walker*, 11 How. 271, 290; *Knote* v. *United States*, 95 U.S. 149, 154; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321. The clause

is thus a limitation on the executive branch; it has never been considered to prohibit Congress from keeping certain expenditures secret where the interests of national security so require.*

Since respondent is not within the narrow exception to *Frothingham* established by *Flast*, the court below was wrong in holding that he had standing to challenge the constitutionality of the Act.

2. The holding below conflicts with the decisions of other federal courts subsequent to *Flast* v. *Cohen*, which have uniformly limited taxpayer suits to challenges to expenditures under Article I, section 8 which allegedly contravene some specific constitutional limitation. *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W. D. Pa.), affirmed, 401 U.S. 901; *Troutman* v. *Shriver*, 417 F. 2d 171 (C.A. 5), certiorari denied, 397 U.S. 923; *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10),

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* Shortly after the Constitution was adopted, President Madison sent a confidential communication to Congress outlining his recommendation that he be authorized to take possession of parts of Spanish Florida. Congress then passed a secret appropriation act, appropriating one hundred thousand dollars for the occupation and forbidding the publishing of the appropriation law. See Miller, *Secret Statutes of the United States*, Government Printing Office (1918); 3 Stat. 471, 472. The statutes were not made public until 1818 when the controversy over Florida had ended.

More recently also, Congress has found secrecy to be in the national interest. For example, over $2 billion was secretly expended on the Manhattan Project to develop the atomic bomb during World War II. See also statutes making confidential appropriations, *e.g.*, 28 U.S.C. 537 (F.B.I. expenditures); 31 U.S.C. 107 (Presidential expenditures for foreign intercourse); 42 U.S.C. 2017(b) (Atomic Energy Commission expenditures).

certiorari denied, 396 U.S. 1042; *Lamm* v. *Volpe*, 449 F. 2d 1202 (C.A. 10); see *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176 (D. N.J.); *Pietsch* v. *President of the United States*, 434 F. 2d 861 (C.A. 2), certiorari denied, 403 U.S. 920.[7]

In *Richardson* v. *Kennedy, supra*, a three-judge district court denied standing to a taxpayer (the respondent herein) who challenged the constitutionality of the Postal Revenue and Federal Salary Act of 1967, 2 U.S.C. 351, *et seq.* The district court held the taxpayer was without standing because the expenditure was not made pursuant to Article I, section 8, but rather under Article I, section 6, and this Court summarily affirmed. Similarly, standing was denied a taxpayer challenging an amendment to the Social Security Act which limited federal payments to States for aid to dependent children, on the ground that there was no allegation of an unconstitutional congressional expenditure. *Essex County Welfare Board* v. *Cohen, supra.*

CONCLUSION

This ruling represents a serious departure from the limitations upon taxpayer standing as set forth by this Court in *Flast* and applied by the lower federal

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[7] In two recent decisions the courts have concluded, as did Chief Judge Seitz below, that persons had no standing to challenge particular statutes as taxpayers, but that they nevertheless had standing as citizens. *Atlee* v. *Laird*, 339 F. Supp. 1347, 1353–1354 (E.D. Pa.), dismissed on other grounds by a three-judge court, 347 F. Supp. 689; *Reservists Committee To Stop the War* v. *Laird*, 323 F. Supp. 833, 839–840 (D. D.C.), affirmed, C.A.D.C., No. 71–1535, October 31, 1972.

courts. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

WALTER H. FLEISCHER,
WILLIAM D. APPLER,
Attorneys.

DECEMBER 1972.

APPENDIX A

UNITED STATES COURTS OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,277

WILLIAM B. RICHARDSON, *Appellant*

v.

UNITED STATES OF AMERICA; DAVID M. KENNEDY, Secretary of the Treasury for the UNITED STATES; and S. S. SOKOL, Commissioner of Accounts for the Secretary of the Treasury, UNITED STATES Government

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(D. C. Civil Action No. 70-23)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 25, 1971

Before VAN DUSEN and ROSENN, *Circuit Judges*, and KRAFT, *District Judge*

Supplemental Briefs Submitted December 2, 1971

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, HUNTER, *Circuit Judges*, and KRAFT, *District Judge*, on submission before the Court En Banc by Order dated May 11, 1972

OPINION OF THE COURT

(Filed July 20, 1972)

ROSENN, *Circuit Judge.*

In contrast to the case frequently heard on appeal, in which the Government seeks an accounting from the taxpayer, here it is the taxpayer who seeks an accounting from the Government. Appellant, acting *in propria persona*, complained that the Government's consolidated statement, entitled "Combined Statement of Receipts, Expenditures and Balances of the United States Government," fails to show monies received and expended by the Central Intelligence Agency (CIA). He alleged that the Central Intelligence Agency Act relieving the Secretary of the Treasury from publishing such figures was repugnant to the Constitution and void. He sought a writ of mandamus to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the CIA and to enjoin any further publication of the Combined Statement which did not reflect them. His application for a three judge court was denied by the district court which subsequently dismissed the complaint on grounds of standing and justiciability.[1] We will vacate the order and remand.

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1. The procedural history of this case is confused. Appellant filed his complaint on January 8, 1970. Only eight days later his request for a three judge court was denied, and the case was ordered set down for assignment in the usual manner. Using hindsight, we can now see that the order of January 16, 1970, which presumably was based on a finding that there was no substantial constitutional question, Majuri v. United States, 431 F.2d 469, 472-73 (3d Cir.), *cert. denied*, 400 U.S. 943 (1970), largely determined appellant's case and made any further relevant litigation on the merits unlikely. Donovan v. Hayden Stone, Inc., 434 F.2d 619 (6th Cir. 1970). However, neither party nor the district judge so construed the action. On March 20, the Government filed a motion to dismiss and *on April 22 filed a motion to deny convening a three judge court*. On April 27 another district judge directed plaintiff to *file a brief on the questions of dismissal and a three judge court*, and on May 19, appellant *filed a motion to convene a three judge court*. On June 15 the hearing was held and on June 16 appellant's case was dismissed. A timely appeal was taken from that action. The January 16 order might have been appealable if it: (1) foreclosed future litigation and put him out of court, Idlewild Bon Voyage

After oral argument, this court deemed the issues raised by the case of sufficient importance to necessitate the appointment of amicus curiae, Professor Ralph S. Spritzer of the University of Pennsylvania Law School, formerly Acting Solicitor General of the United States. He has submitted a thoughtful brief to which all parties have responded.

Liquor Corp. v. Rohan, 289 F.2d 426, 428 (2d Cir. 1961), modified on other grounds sub nom. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 n.2 (1962); (2) denied a preliminary injunction, Majuri v. United States, supra, or (3) dismissed the action at the same time, Jones v. Branigin, 433 F.2d 576, 579 (6th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971). That order would clearly not have been appealable if there were other claims that had to be disposed of by the single judge district court to which the case had been assigned after denial of the three judge court. Cancel v. Wyman, 441 F.2d 553 (2d Cir. 1971); Lyons v. Davoren, 402 F.2d 890 (1st Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969). This case is in between those two poles in that all parties believed there was further business for the district court, even though it is difficult for us to understand the basis for such a conclusion. In these circumstances we consider the order of January 16 interlocutory and not a final appealable order under 28 U.S.C. §1291, and that the appeal from the order of June 16 properly raises the question of the denial of the three judge court. Sackett v. Beaman, 399 F.2d 884, 889 n.6 (9th Cir. 1968). In any case, we note that a single judge court's actions after an improper denial of a three judge court are of no effect, for they are taken without jurisdiction. Lyons v. Davoren, supra, at 892. Therefore, even though appellant did not raise the question of the propriety of the denial of the three judge court at an earlier stage, he can still raise the question here because it goes to the jurisdiction of the single judge court to enter its order of dismissal.

Appellant brought an earlier suit challenging the CIA's accounting, alleging jurisdiction under 28 U.S.C. §1331. That suit was dismissed because he failed to show the matter in controversy exceeded the value of $10,000. Richardson v. Sokol, 409 F.2d 3 (3d Cir. 1969), *cert. denied*, 396 U.S. 949 (1969). Because that decision was jurisdictional, he is not barred from raising the merits in this action. Etten v. Lovell Manufacturing Company, 225 F.2d 844, 846 (3d Cir. 1955), *cert. denied*, 350 U.S. 966 (1956). 1B Moore's Federal Practice ¶0.405[5].

THE CONSTITUTIONAL AND STATUTORY CONTEXT

Because appellant sought to challenge the system by which the Federal Government accounts for funds spent by the Central Intelligence Agency, a brief explanation of that system is necessary to put his action in appropriate context.

The Federal Government's spending powers, enumerated in article I, section 8 of the Constitution, are regulated by article I, section 9, clause 7, which provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

In accordance with this mandate, all federal agencies except the CIA receive an annual specific appropriation from the Congress. 31 U.S.C. §696. The Secretary of the Treasury then prepares an annual statement by "head of appropriation" for the use of the Executive, the Congress and the public reflecting how much each agency has spent during the previous fiscal year. 31 U.S.C. §§668(a), 1029. Since there is no specific appropriation for the CIA, its receipts and expenditures are not listed in the document.

The Central Intelligence Agency Act of 1949, 63 Stat. 208, 50 U.S.C. §403 et seq. (1970), established a unique procedure for funding the CIA. Section 403f(a) permits the CIA to transfer and receive funds from other agencies with the approval of the Bureau of the Budget (now Office of Management and Budget) "without regard to any provisions of law limiting or prohibiting transfers between appropriations." Once the money has been spent, the CIA need not disclose its functions or personnel, 50 U.S.C. §403(g), and:

> [t]he sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government

> funds; and for objects of a confidential extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified. 50 U.S.C. §403(j)(b).

This procedure creates a two-step system for disbursement of the Treasury's monies to the CIA. First, Congress appropriates money to some other agency, and then that agency transfers the funds to the CIA. The only accurate accounting for the funds is the certificate rendered by the Director of the CIA, but it does not appear that this certificate or its contents are made available to the public. Presumably the money actually spent is reflected in the Treasury Department's annual statement as a disbursement by the original agency to which Congress made the appropriation, although it may not be reflected at all.

Appellant Richardson, a citizen and taxpayer residing in Greensburg, Pennsylvania, wrote the Treasury Department, inquiring about the annual expenditures of the CIA. He was informed by defendant Sokol, the Treasury officer in charge of the publication of the annual statement, that the Treasury Department did not receive information on the CIA because of the congressional determination that such information should not be made public. He further stated that neither he nor the defendant Secretary of the Treasury had access to the information appellant desired. There was no further administrative relief available.

Appellant then brought this action alleging that the appellees have a constitutional and statutory obligation to set forth an accurate accounting of the expenditures of the United States. He contended that the Central Intelligence Agency Act of 1949, which creates an exception for the CIA, is repugnant to the Constitution because its prohibition against reporting the CIA's expenditures contravenes the mandate of article I, section 9, clause 7. He asked that a three judge court be convened to determine the constitutionality of the Central Intelligence Agency Act, and that

a mandamus issue against the defendants requiring them to publish a financial statement which complies with the commands of the Constitution and the remaining acts of Congress.

Appellant also alleged that the constitutional duty to provide a regular account of receipts and expenditures of public money is one owed to the citizen and taxpayer, for its obvious design is to provide members of the electorate with information lying at the core of public accountability in a democratic society.

JURISDICTION

Appellant alleges several grounds for jurisdiction, only one of which is proper.[2] It is the relatively new Mandamus and Venue Act, 28 U.S.C.A. §1361, which states:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The legislative history of the mandamus statute reveals that the statute's construction turns upon traditional mandamus law. Davis, *Administrative Law Treatise* (1970 Supplement) §23.10. In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of the exercise of judgment or discretion." *Clacka-*

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2. None of the other bases of jurisdiction appellant alleges are applicable. Appellant may not predicate jurisdiction upon 28 U.S.C. §1346(a)(2) since he has alleged no monetary damages. Blanc v. United States, 244 F.2d 708 (2d Cir.) *cert. denied*, 355 U.S. 874 (1957); Universal Transistor Products Corp. v. United States, 214 F. Supp. 486 (E.D.N.Y., 1963); nor can 5 U.S.C. §§701-704 form a basis for jurisdiction, since this circuit has held that the statute is not jurisdictional. Zimmerman v. United States, 422 F.2d 326 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970), and cases cited therein. Finally, 5 U.S.C. §552(a)(3) does not apply to "matters that are . . . (3) specifically exempted from disclosure by statute. . . ." 5 U.S.C. §552(b)(3).

mas County, Ore. v. McKay, 219 F.2d 479, 489 (D.C. Cir. 1954). *ICC v. New York, New Haven & Hartford R.R.*, 287 U.S. 178, 204 (1932). *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969). An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt. *United States v. Walker*, supra. Additionally, plaintiff must have exhausted all other available means of relief. *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969) *cert. denied*, 397 U.S. 941 (1970).

What is the nature of the duty which appellant charges was breached? The duty alleged here arises under article I, section 9, clause 7 as implemented by the Congress under 31 U.S.C. §§66b(a) and 1029.[3] Appellant's position is that save for the existence of the Central Intelligence Agency Act, Congress would be required to appropriate money specifically for the CIA, and the Secretary of the Treasury would be required to give an accounting to the President, the Congress and the public for that agency's expenditures by that head of appropriation, as mandated by 31 U.S.C. §1029.

The Government argues that no specific duty exists because the Congress has, by the Central Intelligence Agency Act, relieved the Secretary of the Treasury of the obligation to publish a statement pertaining to funds received and expended by the CIA. It also contends the Secretary cannot be under such an obligation because he does not possess the CIA's accounts.[4]

We do not decide the constitutionality of the Central

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3. 31 U.S.C. §1029 in pertinent part states: "It shall be the duty of the Secretary of the Treasury annually to lay before Congress, . . . an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, . . . designating the amount of the receipts, whenever practicable, by ports, district, and States, and the expenditures by each separate head of appropriation."

4. On remand, appellant may wish to consider whether any additional party should be added as a defendant.

Intelligence Agency Act. However, for the purpose of determining whether mandamus will lie against him in the federal courts, an officer of the Government cannot deprive the court of jurisdiction to compel performance of an otherwise clear statutory duty by invoking the authority of what is challenged as an unconstitutional law. *In re Ayres*, 123 U.S. 443, 506 (1887); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1875); *National Association of Government Employees v. White*, 418 F.2d 1126, 1129 (D.C. Cir. 1969); *cf. Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949). As a practical matter, this rule avoids the multiplicitous litigation that would arise if a party were first required to litigate the constitutionality of a statute in a separate action and then later secure specific relief in another proceeding by mandamus. More importantly, if a law is unconstitutional, it is void and of no effect, and it cannot alter an otherwise valid obligation of a governmental officer to a citizen. To permit a defense based upon an unconstitutional law would prevent a plaintiff, such as appellant, from using the mandamus remedy to enforce his rights even though the Government has not otherwise shown the court a valid reason to deny the relief demanded. Such a defense would have the effect of sustaining the very statute which the court is asked to strike as unconstitutional.

Therefore, the Government may not rely on the CIA Statute to preclude jurisdiction of this mandamus action.

Except for the CIA Statute, the Secretary of the Treasury is under a clear command of Congress to account for all monies as they are actually expended by the different federal agencies. In fulfilling that duty, he has no discretion. 31 U.S.C. §1029.

Nor are we persuaded by the Government's argument that the duty of the Secretary of the Treasury is not specifically owed to the appellant. The debates at the Constitutional Convention in 1787 and the state ratifying conventions reveal that those who proposed the present language of the clause believed that the citizenry should receive some

form of accounting from the Government.[5] The use of the word "published" in article I, section 9, clause 7 emphasizes that intention. Article II, section 3 requires the President "from time to time [to] give to the Congress Information on the State of the Union," and presumably the Framers could have utilized the same informal procedure with regard to the accounting if they had so wished. Instead, they chose to have the statement "published," indicating that they wanted it to be more permanent and widely-circulated than the President's message. The connotation must be that the statement was for the benefit and education of the public as well as coordinate branches of the Government.

This constitutional obligation to account to the public is supported by the Congressional enactment of 31 U.S.C. §66b(a), which provides:

> The Secretary of the Treasury shall prepare such reports for the information of the President, the Congress, and *the public* as will present the results of the financial operations of the Government. . . . (emphasis supplied).

In furtherance of this general duty, Congress enacted 31 U.S.C. §§1027-30,[6] which provide for various specific reports, including the Combined Statement of Receipts and Expenditures provided for in Section 1029.

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5. When George Mason proposed the amendment that ultimately became the part of article I, section 9, clause 7 requiring the publication of a regular statement of receipts and expenditures, the only debate concerned the proper extent of the Government's obligation. At least inferentially, everyone seemed agreed on the need for some such statement. 2 Farrand, The Records of the Constitutional Convention (1927 ed.) 618-19. A year later during the Virginia Convention called to ratify the Constitution Mason and Madison defended the clause as the only way to assure some satisfactory reporting to the public. 3 Farrand 326. The same position was urged by James McHenry, a delegate to the Constitutional Convention, in the Maryland House of Delegates when they voted on ratification. 3 Farrand 149-50.

6. 31 U.S.C. §1028, dealing with the Post Office Department, was repealed August 12, 1970.

Thus Congress' own language indicates that the Secretary's duty to present financial reports runs not only to the President and the Congress, but also to the public at large. If these reports are misleading and inadequate, there is no reason why Richardson, as a taxpayer, should not be able to require the appropriate executive officer to perform his obligations. The right of the taxpayer to receive reasonably complete reports of governmental expenditures is within the "zone of interest protected by the statute . . . in question" and one for which he may suffer a cognizable injury. *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); *accord, Barlow v. Collins*, 397 U.S. 159 (1970).

Finally, appellant has exhausted his avenues for administrative relief, he has no other remedy, and his only recourse now is judicial redress.

Appellant's case meets all the considerations required for mandamus. While mandamus should be construed liberally in cases charging a violation of a constitutional right, *cf. Fifth Avenue Peace Parade Committee v. Hoover*, 327 F. Supp. 238, 243 (S.D. N.Y. 1971), even under principles of strict construction appellant has set forth a clear duty owed to him by the Secretary of the Treasury.

STANDING

The appellant must also have sufficient standing in order to invoke the jurisdiction of a federal court.[6A] Article III, section 2 limits the judicial power of federal courts to consideration of "cases" or "controversies."

6A. In the normal procedure, once a district judge concludes that a three-judge court should be convened, it would appropriately consider, inter alia, the issue of standing. Since one of the grounds, however, for the dismissal of the case by the district court was the lack of standing, that issue is properly before us on this appeal and, in the interest of judicial efficiency, a disposition of it may avoid the necessity of additional appeals to this court. *See* Port of New York Authority v. United States, 451 F.2d 783, 785, n. 4 (2d Cir. 1971), Crossen v. Breckenridge, 446 F.2d 833, 838 (6th Cir. 1971).

Association of Data Processing Organizations, Inc. v. Camp, supra, at 151, *Flast v. Cohen*, 392 U.S. 83, 1-1-102 (1968). When a plaintiff does not have a stake in the outcome of the litigation to assure a sufficient adverseness in the proceedings to make it a true "case" or "controversy," we have no jurisdiction to entertain his request. *Flast v. Cohen*, supra, at 101-102.

Flast established a two prong test to ascertain whether a plaintiff, such as appellant, who is a taxpayer, has the requisite adversary interest: (1) the plaintiff must establish a nexus between his status as a taxpayer and the challenged Government activity to give him a personal stake in the action; and (2) his claim must relate to a specific constitutional prohibition so that the issues may be sharpened and focused sufficiently for proper judicial resolution.

Although the district court did not specify its reasons for finding that appellant lacked standing, we assume that it applied *Flast* and found his case deficient thereunder. We cannot agree.

The decision in *Flast* breached the absolute barrier to taxpayer suits erected by an earlier Supreme Court decision. *Frothingham v. Mellon*, 262 U.S. 447 (1923). *Frothingham* absolutely barred a taxpayer from objecting to a Government spending program as a violation of the tenth amendment and the due process clause of the fifth amendment, on the theory that taxpayer was affected by the law only to the extent that the public in general was affected by increased taxes. Id., at 487. The Court feared a contrary decision would have opened the floodgates of litigation, and would have permitted people to litigate issues even though they did not have an adequate incentive for a vigorous prosecution because of the miniscule and remote nature of their interests. Id.

Flast did not completely overrule *Frothingham*. Chief Justice Warren's decision distinguished the latter case on the ground that a taxpayer could not properly object under the due process clause to general increases

in his tax bill, but a taxpayer could object to any program provided under article I, section 8 that exceeded specific constitutional limitations on the taxing and spending powers of Congress. The Chief Justice believed that:

> Under such circumstances, we feel confident that the question will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System. . 392 U. S. at 106.

A taxpayer could object to such outlays because there was a sufficient link between his status as a taxpayer and the act to assure a personal stake in the outcome of the controversy. That stake would provide " 'the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 (1962)." 392 U.S. at 99. Although the connection in *Flast* is concededly different from the one at issue here, both taxpayers have sufficient personal stake in the litigation. Plaintiffs in *Flast* contended they were being taxed to support an unconstitutional program that was in violation of the first amendment's establishment clause. Appellant argues that he has a right under the Constitution to "a Regular Statement and Account," but that he is being deprived of that right because of the Government's adherence to the allegedly unconstitutional Central Intelligence Agency Act.

The Government argues that *Flast* must be limited to challenges to appropriations. That view attempts to confine the case to its facts without regard to its rea-

soning. *Flast* is concerned with adverseness and specificity of issues for "standing," not spending *per se*.[7]

Even under the Government's argument, appellant's claim is still sufficient because it is integrally related to the appropriations process and the taxpayer's ability to challenge those appropriations. Although *Flast* recognizes standing of a taxpayer to challenge expenditures, how can a taxpayer make that challenge unless he knows how the money is being spent? Without accurate official information concerning the amount and purpose of the expenditures, there could be no basis for a taxpayer suit. It would be inconsistent to affirm the viability of taxpayers' suits on the one hand but take away a necessary precondition for those suits on the other.[8]

The Government's position is not sound to us and we must reject it. We believe that the nexus between a

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7. Velvel v. Nixon, 415 F.2d 236, 239 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970), held that a plaintiff had no standing to challenge expenditures for the Vietnam War. They reasoned that Flast permitted challenges only to spending under the "general welfare" clause of article I, section 8 and not to exercises under the specific enumerated powers, such as the right to provide for Armies and a Navy. We fail to see anything in Flast which requires a limitation of taxpayer suits to the general welfare clause. Suits challenging exercises of specific powers can certainly have the adverseness required, and there is nothing more in the Flast opinion which evinces a limitation of the taxpayer suit to certain types of subject matter.

8. The interest of a citizen to compel disclosure of this information without reference to his taxpayer's status might be an acceptable basis for this challenge. Atlee v. Laird, No. 71-2324 (E.D. Pa. March 28, 1972); Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833, 840 (D.D.C. 1971). But we need not decide that issue. Whatever the interest of a citizen in knowing where his Government has spent *its* money, the interest of a taxpayer in knowing where *his* money has gone is more compelling and direct. Chief Judge Seitz is of the opinion that this plaintiff does not have standing as a taxpayer. *See*, Flast v. Cohen, 392 U.S. 83 (1968). However, he does agree that standing exists by reason of plaintiff 's status as a voter and citizen.

taxpayer and an allegedly unconstitutional act need not always be the appropriation and the spending of his money for an invalid purpose. The personal stake may come from any injury in fact even if it is not directly economic in nature. *Association of Data Processing Organizations, Inc. v. Camp*, supra, at 154. A responsible and intelligent taxpayer and citizen, of course, wants to know how his tax money is being spent. Without this information he cannot intelligently follow the actions of the Congress or of the Executive. Nor can he properly fulfill his obligations as a member of the electorate. The Framers of the Constitution deemed fiscal information essential if the electorate was to exercise any control over its representatives and meet their new responsibilities as citizens of the Republic;[9] and they mandated publication, although stated in general terms, of the Government's receipts and expenditures. Whatever the ultimate scope and extent of that obligation, its elimination generates a sufficient, adverse interest in a taxpayer.

In the second prong of the *Flast* test the Court inquired whether there was a specific section in the Constitution which operated to limit the Congress' taxing and spending powers. It noted that whether there are limitations other than the establishment clause would have to be decided by future litigation. 392 U.S. at 105. Appellant's claim raises such a limitation. While article I, section 9, clause 7 is procedural in nature, and while the establishment clause is substantive in nature, both are nonetheless limitations on the taxing and spending power. It would be difficult to fashion a requirement more clearly conveying the framers' intention to regularize expenditures and to require public accountability.

Article I, section 9, clause 7 relates exclusively to the taxpayer's interest in the expenditure of public monies. It is unlike the due process clause of the fifth amendment and the tenth amendment, raised in *Frothing-*

9. Supra, note 5.

ham, which are designed to check a much broader range of possible abuses of power. Appellant does not raise any generalized complaints about the operation of his Government. He does not even complain that the CIA should not receive the money it presently spends, provided this money is properly appropriated and reported. He only seeks an accurate statement of account for the tax money extracted from him and spent. He relies on a specific constitutional provision to protect him from what he alleges is a legislative abuse of power, the non-accounting features of the Central Intelligence Agency Act.

We note that if appellant, as a citizen, voter and taxpayer, is not entitled to maintain an action such as this to enforce the dictate of article I, section 9, clause 7, of the United States Constitution that the Federal Government provide an accounting of the expenditure of all public money, then it is difficult to see how this requirement, which the framers of the Constitution considered vital to the proper functioning of our democratic republic, may be enforced at all. A decision to deny standing to the appellant in these circumstances would not seem consistent with the limited scope of the standing requirement. *See Sierra Club v. Morton*, — U.S. —, —, 40 U.S.L.W. 4397, 4401 (1972):

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.
> (Footnote omitted.)

McGowan v. Maryland, 366 U.S. 420, 429-30 (1961); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958):

> The [standing] principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. See Barrows v. Jackson, 346 U.S. 249, 255-259; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 183-187 (concurring opinion.)

Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833, 841 (D.D.C. 1971):

> It is not irrelevant [to the standing issue] to note that if these plaintiffs cannot obtain judicial review of defendant's action, then as a practical matter no one can.
> (Footnote omitted.)

We have carefully avoided expressing any opinion on the merits of the appellant's claim. The complaint, however, contains sufficient allegations to give the appellant standing consistent with article III of the Constitution to invoke the court's jurisdiction for an adjudication on the merits.

THREE JUDGE COURT

We next consider whether a three judge court should have been convened to hear appellant's complaint. 28 U.S.C. §2282[10] provides that an application for an injunction restraining the enforcement, operation or execution of any act of Congress for repugnance to the Constitution

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10. 28 U.S.C. §2282 reads:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

of the United States shall not be granted by any district court unless heard by three judges.

The threshold question, therefore, is whether a complaint in which jurisdiction is grounded solely on the mandamus statute falls within the terms of this Act, independently of the additional prayer for injunctive relief which is stated in the complaint.[11] The Supreme Court has recently cautioned that the three judge court statute is not a "'measure of broad social policy . . .' [citation omitted]", *Mitchell v. Donovan*, 398 U.S. 427, 431 (1970), and that the term "injunction" as used in 28 U.S.C. §1253, and presumably in 28 U.S.C. §2282, is to be narrowly construed. Id. A sufficiently narrow construction might serve then to bar a three judge court from hearing a mandamus action, but such a result would not be faithful to the intent of Congress. Section 2282 was enacted as a protective device to shield the Government from suits which might disrupt its operations. It was not intended for the convenience of the plaintiff. The legislative history of this section reveals that it, and its complement, §2281, "were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal by issuance of a broad injunctive order."[12] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (1963).

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11. Jurisdiction was not predicated on the prayer for injunctive relief since appellant did not comply with 28 U.S.C. §1346(a)(2). See f.n. 2, supra.

12. In extrapolating the substance of the Congressional debates, Mr. Justice Goldberg in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155 (1962), stated that "[r]epeatedly emphasized during the congressional debates on §2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong. Rec. 479-481, 2142-2143 (1937)."

This action, while based on the mandamus statute, in substance contemplates injunctive relief. It prays, inter alia, for a permanent injunction apparently in aid of the mandamus restraining publication of the Combined Statement of Receipts, Expenditures and Balances. Therefore, the action is for all practical purposes substantially similar to a mandatory injunction. In ascertaining the substance of the action we are required to look beyond the prayer for relief to the substantive allegations of the complaint. *Majuri v. United States*, 431 F.2d 469, 473 (3d Cir.), *cert. denied*, 400 U.S. 934 (1970). Since the merger of law and equity under the Federal Rules Enabling Act of 1934[13] and the adoption of Rule 2 of the Fed. R. of Civil Proc. (28 U.S.C.A. Rule 2) providing for only one form of action, there is little difference in substance between a mandamus and a mandatory injunction. *Rolls-Royce, Inc. v. Stimson*, 56 F. Supp. 22, 23 (D.D.C. 1944). The Supreme Court, in discussing the distinction drawn by the Court more than a half century before, stated that "[t]he distinction . . . between mandamus and a mandatory injunction seems formalistic in the present day and age," when rules of pleading are simplified "and, more importantly, before the merger of law and equity." *Stern v. South Chester Tube Co.*, 390 U.S. 606, 609 (1967). Just as injunctions are effective immediately and are punishable by contempt when disobeyed, so is mandamus. *See Denver-Greeley Valley Water Users Association v. McNeil*, 131 F.2d 67 (5th Cir. 1942). Even prior to the Enabling Act of 1934, the Supreme Court observed that although the remedy by mandamus is at law, its allowance was controlled by equitable principles. *United States v. Dern*, 289 U.S. 352, 359 (1933).[14]

Unless we require that the instant action withstand the scrutiny of a three judge court under §2282, the whole purpose and policy of the act can be aborted by allowing the appellant to initially seek only a declaration of invalidity

13. 28 U.S.C. §2072 (1970 Ed.) (48 Stat. 1064).

14. *See also*, Virginian Ry. v. Federation, 300 U.S. 515, 551 (1937).

of the CIA statute in the mandamus action before a single judge. Based on such a decision which has immediate effect, he can mount a subsequent request, if necessary, for an ancillary injunction.[15] The ultimate effect of this action, if successful, will be to alter immediately the operation of critical features of the Central Intelligence Agency Act. Further, while based on the mandamus statute, this action contemplates injunctive relief in aid of the mandamus through restraining the publication of the Combined Statement of Receipts Expenditures and Balances until it reflects the CIA's operations.

In these circumstances we hold that the district court was required to request the convening of a three judge court, unless it appears that the constitutional issue raised by appellant in this action is insubstantial.

Whether the issue is insubstantial must be determined by the allegations of the bill of complaint. *Mosher v. City of Phoenix*, 287 U.S. 29 (1932). No question for a three judge court exists if the allegations of the complaint reveal that the "question may be plainly insubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" *Ex Parte Poresky*, 290 U.S. 30, 32 (1933). *See also, Bailey v. Patterson*, 369 U.S. 31 (1962); *Local Union No. 300, Amal. Meat Cutters & B. Work. v. McCulloch*, 428 F.2d 396 (5th Cir. 1970).

All parties to this litigation concede that there is no prior decision which directly controls the outcome of this case. Nevertheless, the Government would have us conclude that the question raised is plainly without merit. The face of the complaint reveals no such infirmity. The appellant seeks to void legislation allegedly repugnant to a spe-

15. As Professor Currie points out, "since the injunction will be sought on the ground that the statute is unconstitutional, what remains for the three judges to decide?" 32 U. CHI. L. REV. 1, 17 (1964).

cific constitutional mandate. The language of article I, section 9, clause 7 could be reasonably construed in appellant's favor, and there is nothing in prior decisions of the Supreme Court which forecloses such interpretation.

An additional reason for dismissal of this action by the district court was that the question posed by appellant in his complaint was not justiciable because it was barred by the political question doctrine. We make no comment except to state that this issue is intertwined with the merits of the case and it must be left for development at the subsequent hearing before the three judge court.[16]

We conclude, therefore, that the complaint presents a constitutional cause of action raising a substantial question[17] which requires the convening of a three judge court.[18] On remand, the district judge will take appro-

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16. *Cf.* Land v. Dollar, 330 U.S. 731 (1947); Continental Gas Company v. Department of Highways State of La., 379 F.2d 673 (5th Cir. 1967); Schramm v. Oaks, 352 F.2d 143 (10th Cir. 1965); Sunray Dx Oil Co. v. Federal Power Comm., 351 F.2d 395, 400 (10th Cir. 1965); Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F.2d 780 (6th Cir. 1958).

17. Chief Judge Seitz does not interpret the district court order of January 16, 1970, as a determination of the question of substantial federal question. Therefore, he views this issue as presently not before this Court and, on remand, would require the district court specifically to determine the existence of a substantial question before requesting that a three-judge court be convened.

18. Although appellant does not allege that his suit is a class action on behalf of all citizens, taxpayers, and people of the United States, his pro se complaint is replete with references to the effect of the Secretary of the Treasury's allegedly unconstitutional failure to publish the receipts and expenditures of the CIA on "the People" and "Citizens" of the United States. See, *e.g.*, paragraphs 16-c, 27, 36, 41, 45, 49 of the complaint. Because of the references and the intricate constitutional issues involved, we appointed amicus curiae to brief the issues raised by appellant's pro se complaint. For reasons best known to him, appellant opposed this effort by the court; indeed, on September 27, 1971, he attempted to secure review of his claims by the Supreme Court in advance of judgment, which review was denied. See Richardson v. United States, 40

priate steps to request the Chief Judge of this Court to designate a statutory three-judge court. All remaining issues not resolved in this opinion shall be adjudicated by the court so convened.

The order of the district court will be vacated and the cause remanded for further proceedings consistent with this opinion.

ADAMS, *Circuit Judge*, Dissenting.

The pivotal issue in this case, as I view it, is whether a citizen-taxpayer has the standing to obtain an injunction requiring the defendants to render an accounting of funds received and expended by the CIA.

Although there is considerable force to the position articulated by the majority, a review of the historical foundations for, and the development of, the standing doctrine leads ineluctably to the conclusion that the plaintiff here may not continue his action.[1] Accordingly,

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U.S.L.W. 3134, 3276 (No. 71-443, Supreme Court of the United States).

We recognize a litigant's right to proceed in a civil action pro se. See 28 U.S.C. §1654. However, the federal courts have authority under article III of the United States Constitution to hear only cases presented in a proper adversary manner with the issues framed with the necessary specificity and the litigation appropriately pursued so that the "constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." Flast v. Cohen, supra, at 106. Since this matter will now require the convening of a district court of three judges, of whom one must be a circuit judge, it "involves a serious drain upon the federal judicial manpower," Kessler v. Dept. of Public Safety, 369 U.S. 153, 156 (1961), which we can ill afford. In the circumstances of this case, the proper presentation of the issues to that court would clearly be facilitated if appellant were assisted by a member of the federal bar, acting either as his counsel or as amicus curiae.

1. In view of the position we take here, it is not necessary to discuss the political question issue which so often lurks in the background of suits of this nature.

I respectfully dissent from the result reached by the majority.

The question of standing has confounded courts and commentators for many years. Although the Supreme Court has considered the problem in several different contexts, and many learned and provocative articles have discussed the Supreme Court decisions, the law is still quite murky. This is particularly so here, since this case is essentially one of first impression. .

By now it is clear that a person may not invoke the judicial process to secure the relief he demands unless he has standing to do so. But what combination of circumstances operate to confer standing on one plaintiff and not another? The answer to that question does not admit to easy analysis.

I. STANDING AND CONSTITUTIONAL REQUIREMENTS

The first point of reference in determining the parameters of standing is Article III, Section 2 of the Constitution, which provides, in part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

A careful reading of Article III, Section 2 reveals that the existence of a case or controversy is mandatory before a federal court has jurisdiction, but the concept

of standing is not mentioned at all. Nevertheless, it has been suggested that standing is a jurisdictional doctrine with a basis in Article III.[2] To determine whether a standing requirement is subsumed in the language of Article III, it is helpful to examine the state of the law at the time the Constitution was ratified.

Professor Raoul Berger has analyzed the English and American law extant in 1787, when the Constitution was adopted, as well as the remarks of the various draftsmen and proponents of the Constitution. Based on such a review, he concluded that courts were incorrect when they relied on the practice in 1787 to read standing into the case or controversy limitation because English practice in the Eighteenth century encouraged suits by "strangers to attack unauthorized action." Berger, *Standing to Sue in Public Action: Is it a Constitutional Requirement?* 78 YALE L. S. 816, 827 (1969) (footnotes omitted).

From his examination of the views of the Framers, Berger determined that they assumed that the traditional English remedies would be available within the language of Article III to "curb [Congressional] excesses, particularly in light of their desire to leave all channels open for attacks on congressional self-aggrandizement." *Id.* at 829-830 (footnotes omitted) Nevertheless, Professor Berger was frank to admit that the evidence supporting his view is "scanty" and that there may well be policy considerations which justify the standing doctrine.

Although the words "cases" and "controversies" and the phrase "of a judicial nature" (to use Madison's characterization) delimit the jurisdiction of the federal courts, they do not define nor are they synonomous with standing. In Tileston v. Ullman, 318 U.S. 44, 46 (1943), the Supreme Court stated that it would not determine "whether the record shows the existence of a genuine

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2. *See* Adler v. Board of Educ., 342 U.S. 485 (1952) (Frankfurter, J., dissenting); Coleman v. Miller, 307 U.S. 433, 406-465 (1939) (Frankfurter, J., concurring).

case or controversy" because "the appeal must be dismissed on the ground that appellant has no standing to litigate the constitutional question." And in Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289 (1928), the Supreme Court concluded that despite the plaintiff's standing, "still the proceeding is not a case or controversy within the meaning of Article III * * *." Indeed, the Supreme Court has explained that "[a]part from the jurisdictional requirement, [the] Court has developed a complementary rule of self-restraint for its own governance * * *", Barrows v. Jackson, 346 U.S. 249, 255 (1953), and that the standing requirements were "not principles ordained by the Constitution, but rather rules of practice * * *", United States v. Raines, 362 U.S. 17 (1960).

II. SUPREME COURT CASES

Accordingly, to determine accurately the boundaries of the doctrine of standing, reference must be made, not only to the test of the Constitution, but to the Supreme Court decisions which have discussed the issue.

1. Frothingham v. Mellon

The first case in which the standing requirement was explored in any depth was Frothingham v. Mellon, 262 U.S. 447 (1923). A taxpayer had sued to enjoin expenditures under the Maternity Act, alleging that "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law." 262 U.S. at 486. The Supreme Court affirmed lower court dismissals of the action, stating:

> "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is es-

3. *See also*, Socialist Labor Party v. Gilligan, — U.S. — (1972).

sentially a matter of public and not individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." *Id.* at 487.

After elucidating these policy considerations and the scope of the power of the judiciary to declare acts of Congress unconstitutional, the Supreme Court set forth the test of standing:

> "The party who invokes the power [to declare an act of Congress unconstitutional] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.

2. Significant Decisions Relating to Standing Subsequent to *Frothingham*

In Ex Parte Levitt, 302 U.S. 633 (1937), the Supreme Court was faced with the issue of the standing of a citizen to challenge the constitutionality of the appointment and confirmation of an Associate Justice of the Supreme Court. In denying a motion for leave to file a petition for an order requiring the Justice to show cause why he should be permitted to serve, the Supreme Court stated:

> "The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient.

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action and it is not sufficient that he has merely a general interest common to all members of the public. * * * " *Id.* at 634.[4]

The next significant case is Tileston v. Ullman, 317 U.S. 44 (1943). There, a physician sued in state court for a declaration that state statutes prohibiting the use of drugs or instruments to prevent conception and the rendering of assistance or counsel in their use are unconstitutional. The state court held the statutes were constitutional, and the Supreme Court, in a per curiam opinion, dismissed the appeal because of the appellant's lack of standing. The Court noted that Dr. Tileston was not asserting his own Constitutional rights, but those of his patients, who were not parties to the action.[5]

In Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), three organizations that had been branded as communist by the Attorney General sued for declaratory and injunctive relief, alleging that they had suffered both pecuniary damage and a chilling effect on their First Amendment rights as a result of the defamation. In con-

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4. It is pertinent that the Supreme Court denied leave to file the motion on the ground that the movant did not have standing rather than on the basis that it lacked original jurisdiction to entertain the petition.

5. *In Poe v. Ullman*, 367 U.S. 497 (1961), patients and a doctor both asserted that the state statutes were unconstitutional. The Supreme Court refused to decide the case, on the ground of lack of a justiciable controversy, because the complaints did not allege a threat of prosecution, because the state had initiated only one such prosecution in 82 years (to test the constitutionality of the statute), and because the doctor's constraint in not providing contraceptive devices was not reasonably related to a fear of prosecution. The issue of standing was not discussed in the main opinion.

sidering whether the lower courts had properly dismissed the actions, the Supreme Court, speaking through Mr. Justice Burton, held:

> "Finally, the standing of the petitioners to bring these suits is clear. The touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right." *Id.* at 140-141 (footnotes omitted).

Taxpayers in Doremus v. Board of Education, 342 U.S. 429 (1952), sought a declaration in a state court that a statute providing for the reading of the Bible in the New Jersey public schools was unconstitutional. Although the case was clouded by elements of mootness (one of the plaintiffs was no longer in school), it turned squarely on the issue of standing, which was cast by the Supreme Court in terms of "case or controversy."[6] As to the facets of the case surviving the mootness question, the Court noted that "[n]o information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it." 342 U.S. at 433. The Supreme Court's holding, dismissing the appeal, relied, at least in terms of the language employed, on the fact that no money was at stake. *Id.*, at 434-435.

One of the questions presented to the Supreme Court in Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77 (1958), was whether an intervenor had standing to appeal a judgment of a court of appeals. There, various railroads servicing Chicago sought to employ a new motor carrier to transfer passengers between stations. The new carrier refused to apply for a certificate required by a city ordinance, and when threatened with arrest, sued in federal court to invalidate the ordinance. The old carrier, Parmelee Transportation Co., was granted permission to intervene. Al-

6. *But see* Barrows v. Jackson, *supra*.

though the district court dismissed the complaint, the court of appeals reversed, and both the city and the old carrier appealed. In considering whether Parmelee had standing to secure review of the judgment, the Supreme Court stated: "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome." *Id.* at 83. *See also*, Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1012-1014 (3d Cir. 1971).

Another aspect of standing was addressed by the Supreme Court in NAACP v. Alabama, 357 U.S. 449 (1958). There, the state had sued the NAACP for violation of its foreign corporation registration statute, and moved for discovery of the NAACP's membership list. Although the defendant was willing to apply for registration, it would not disclose its general membership. In an appeal from a contempt citation, the Court held that the Association had standing to assert the Constitutional rights of its members. The Court explained:

> "To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. * * * This rule is related to the broader doctrine that constitutional adjudication should, where possible, be avoided. * * * The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. * * *
>
> "* * * Petitioner is the appropriate private party to assert these rights, because it and its members are in every practical sense identical." *Id.* at 459 (citations omitted).

Thus, the NAACP's standing was predicated on the factual peculiarity of the case: to require the members to assert their rights not to have their names divulged would have

revealed their names.[7] It is also significant that the NAACP was already in court as a defendant when it raised the issue.

McGowan v. Maryland, 366 U.S. 420 (1960), presented two standing issues to the Supreme Court for resolution: (1) whether employees of a store who had been fined for violations of Sunday sales laws had standing to raise "free exercise" constitutional questions; and (2) whether the same persons could assert "establishment clause" rights as a defense to their prosecutions. With regard to the "free exercise question," the Court noted that appellants alleged only personal economic injury, not infringement of their religious freedoms, and held that they therefore had no standing to raise the issue of religious freedom.[8] As to the "establishment clause" issue, the Court stated:

> "Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion. We find that, in these circumstances, these appellants have standing to complain that the statutes are laws respecting an establishment of religion." *Id.* at 430-431 (footnote omitted).

The Court distinguished *Doremus*, *supra*, on the ground that the complainants there failed to show direct and particular economic detriment. As in NAACP v. Alabama,

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7. The members of the NAACP would have had standing in their own behalf because disclosure of the membership list would have had a direct impact on each member. The Court also noted that the Association had standing in its own right because of the injury it would suffer as a result of the action being taken against it by the state. *See also* NAACP v. Butler, 371 U.S. 415 (1963).

8. Because there were no allegations that the statutes infringed upon the beliefs of the store's patrons, the court did not decide if standing existed under Pierce v. Society of Sisters, 268 U.S. 510, 535-536 (1925). But the Court did point out that such persons were not without effective ways to assert their rights, citing NAACP v. Alabama, *supra*; Barrows v. Jackson, *supra*, thus implying that they would have standing in an appropriate case.

supra, the defendants in *McGowan* were already in court, and had not sued as plaintiffs to raise the underlying substantive constitutional issue.[9]

3. Baker v. Carr (Formulation of the test).

Baker v. Carr, 369 U.S. 186 (1962), presented still another facet of the standing problem. There, qualified voters from certain Tennessee counties brought an individual and class action to invalidate the apportionment of the state general assembly. The Supreme Court first formulated the question:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Id.* at 204.

In answering the question affirmatively, the Supreme Court noted that Colegrove v. Green, 328 U.S. 549 (1946), "squarely held that voters who allege facts showing disadvantage to themselves have standing to sue." 369 U.S. at 206.[10] The injury asserted by the plaintiffs in Baker v. Carr was that the apportionment scheme then in effect "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties." *Id.* at 207-208. The Court continued:

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9. *See also*, Griswold v. Connecticut, 381 U.S. 479 (1965). There, the Supreme Court distinguished Tileston v. Ullman, *supra*, on the ground that the doctor in *Griswold* was a defendant as opposed to a plaintiff, as in *Tileston*. The Court stated: "Certainly the accessary should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime." 381 U.S. at 481.

10. *Colgrove* was not a standing case, as such. The decision turned on the judgment that reapportionment of Congressional Districts was a political question. 328 U.S. at 552, 556.

" 'If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes,' *Coleman v. Miller*, 307 U.S. at 438, not merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law. * * *' *Fairchild v. Hughes*, 258 U.S. 126, 129 * * *." *Id.* at 208.[11]

Thus, the key to the decision in Baker v. Carr was the injury suffered by a voter whose vote was diluted by the unequal apportionment of election districts.[12]

The Court was able to reach the merits of the equal protection claim, over the objection that to do so would be to decide a political question, because plaintiffs are entitled to relief from discrimination despite the fact that the discrimination relates to political rights. *Id.* at 209.

4. Abington Township v. Schempp

Apparently, *Doremus*, *supra*, was overruled *sub silentio* by Abington Township v. Schempp, 374 U.S. 203 (1963). *Schempp* was a taxpayer suit, brought in federal court, to enjoin the enforcement of a state Bible-reading

11. Fairchild v. Hughes, 258 U.S. 126 (1921), was a citizen-taxpayer suit in equity for a declaration that the Nineteenth Amendment was improperly ratified by the states, that a law enforcing the amendment, then pending in Congress, was unconstitutional; for an injunction prohibiting the Secretary of State from issuing a proclamation of adoption of the amendment; and for an injunction forbidding the Attorney General from enforcing the proposed act. The Supreme Court denied plaintiff standing because any wrongful acts of the named officials would be directed against election officers, not citizens, and that in any event, the plaintiff was a citizen of a state which had already amended its own constitution to permit women to vote and had ratified the amendment.

12. *See* Neal, *Baker v. Carr; Politics in Search of Law*, the Supreme Court Review, the University of Chicago Law School, 252, 274 (1962).

statute. Chief Judge Biggs, writing for a three-judge court, held that the statute was violative of the First Amendment, that the school children had standing "similar to that of the minor plaintiffs in Brown v. Board of Education, 1954, 347 U.S. 483 * * * *", and that the parents had standing "as the natural guardians of their children, having an immediate and direct interest in their spiritual and religious development * * *." 177 F. Supp. 398 (E.D. Pa. 1959).[13] The Supreme Court affirmed the district court on the merits, but did not discuss the standing question at all.

5. Flast v. Cohen (Frothingham reconsidered).

Eventually, every discussion of standing must come to grips with Flast v. Cohen, 392 U.S. 83 (1968). Whether one wishes to read that case narrowly or expansively, it must still be recognized that the issue there was "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.* at 85. The Court undertook to re-examine *Frothingham* because that opinion was unclear whether the standing requirement there announced was a matter of policy or constitutional doctrine. After analyzing the issue in terms of justiciability, the Supreme Court concluded that there was "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs." *Id.* at 101. Thus, the constitutional basis for *Frothingham*, if it ever existed, was undermined.

Nevertheless, the Supreme Court did not go so far in *Flast* as to suggest that the concept of standing, based upon policy considerations, was no longer viable.

13. An appeal was taken to the Supreme Court, and the matter was remanded to consider the effect of an amendment to the statute. 364 U.S. 298 (1960). On remand, the district court adopted the position it previously assumed with regard to standing. 201 F. Supp. 815, 818 (E.D. Pa. 1962).

Rather, the Court stated the issue, albeit in general terms, "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102.[14] Turning then to the case before it, a challenge to an appropriations measure, the Court set forth two rules governing its decision.

The first rule, or sub-test, is a part of the general standing requirement dealing with nexus, quoted above. In order to maintain a suit, a "taxpayer must establish a logical link between that status and the type of legislative enactment attacked." *Id.* "Thus," the Supreme Court explained, "a taxpayer will be a proper party to allege the unconstitutionality *only* of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.*, (emphasis added).

The statement seems to make clear that taxpayer suits will be entertained only to enjoin expenditures under Article I, Section 8 of the Constitution, and that taxpayers as taxpayers will not have standing under any other circumstances.

The second part of the test set forth in *Flast* is that "the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* The Court explained:

> "Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8." *Id.*

But, this sub-test is not too meaningful when applied to taxpayer suits not challenging appropriations, and therefore

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14. The Supreme Court used as a paradigm the dichotomy formulated in its opinion in McGowan v. Maryland, *supra*.

can properly apply only to suits seeking to enjoin the expenditure of appropriated moneys.

Thus, the general rule of taxpayer standing promulgated by *Flast*, as applied to cases not involving appropriations, if such a generalization is valid at all, is that in order to satisfy the requirement, a taxpayer must show: (1) the connection between his status and the enactment, and (2) the connection between his status and the right he alleged was infringed. In other words, does the enactment challenged affect the taxpayer as a taxpayer? And, if so, does it infringe upon a specific constitutional right possessed by that taxpayer as an individual?[15]

As might be expected, *Flast* received extensive coverage by the commentators. The Harvard *Supreme Court Review* concluded:

> "[t]he *Flast* criteria provide a workable scheme for ascertaining when federal taxpayers should be permitted to sue even though not congressionally designated as proper parties to represent the public interest, but the criteria are not constitutionally compelled. The only constitutional requirement spelled out in *Flast* is that litigants seeking judicial review of congressional action, but not alleging an injury to a legally protected interest, must present some rationale distinguishing their personal interest from that of the general citizenry; any special injury rationale would seem to fulfill this requirement." *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 230 (1968).

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15. Mr. Justice Stewart, concurring in *Flast*, stated that he understood the case "to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment.***" 392 U.S. at 114. He considered that the Court otherwise reaffirmed the holding of *Frothingham*. Mr. Justice Fortas, also concurring, asserted: "The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause." 392 U.S. at 116.

Apparently, the author of the Harvard note analyzed *Flast* in Hohfeldian terms, i.e., the plaintiff must show that some right of his was violated and that he was injured thereby, although the approach of the majority opinion was not so cast.

Professor Jaffe did employ Hohfeldian theory[16] in his analysis of *Flast*. He reasoned that courts, including the Supreme Court, have heard suits initiated by non-Hohfeldian plaintiffs—those not seeking a determination that they possess a right, privilege, immunity or power—and that the requirement of a Hohfeldian plaintiff is no longer justifiable from a policy point of view. *See*, Jaffe, *The Citizen as Litigant in Public Actions: The non-Hohfeldian Or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).

Professor Kenneth Culp Davis criticized the reasoning of Flast v. Cohen. Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968). First, he argued that although nonconstitutional issues were before the Supreme Court, it decided neither the merits nor the standing question in terms of those issues. But more fundamentally, he controverted the statement by Mr. Justice Harlan that:

> "This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits." Flast v. Cohen, 392 U.S. at 131.

Rather, Professor Davis asserted:

> "Even though the law of standing is so cluttered and confused that almost every proposition has some ex-

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16. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

Jaffe's article was written while the *Flast* case was pending in the Supreme Court. But Jaffe's analysis was not adopted by the majority decision in *Flast*, and it might be contended that the Court impliedly rejected it. *See* dissenting opinion of Justice Harlan, 293 U.S. at 119.

ception, *the federal courts have consistently adhered to one major proposition, without exception: One who has no interest of his own at stake always lacks standing.*" 35 U. CHI. L. REV. at 617.[16a]

Professors Lockhart, Kamisar and Choper suggest that *Flast* and *Frothingham* are distinguishable because Mrs. Frothingham was, in reality, attempting to assert her state's interest in maintaining its legislative prerogatives whereas Mrs. Flast was vindicating her personal constitutional right not to be taxed for the establishment or support of a religious institution. W. LOCKHART, & KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 65-66, (1970). This distinction implies that Mrs. Frothingham's right not to be taxed to support a federal program in derogation of a state's police power was not a meaningful personal right. It is apparently derived from the three holdings of *Frothingham* and the companion case of Massachusetts v. Mellon:

(1) The state's contention that the federal act in issue was an attempt to destroy its sovereignty was a non-

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16a. The unsatisfactory aspect of the federal law of standing is, according to Professor Davis, its inconsistency. However, the observation is put forth that:

> "The law of standing need not be either a 'complicated specialty of federal jurisdiction,' as the Supreme Court has called it, or a mass of confused logic-chopping about bewildering technicality. It can be much simpler and much clearer than it is. All that is necessary is to make some firm policy choices and then to apply them consistently." *Id.* at 628 (footnotes omitted).

Professor Davis then states a series of propositions, some affirmative and some negative, to govern the decision whether to grant standing in a particular case. The net effect of Professor Davis' propositions would be to ease the standing requirement necessary to attack legislative enactments.

Raoul Berger also criticized *Flast*, but from an historical basis. He examined the state of the law at the time the Constitution was adopted and concluded that our founding fathers may have contemplated that all citizens would have standing, in the constitutional sense, to attack congressional usurpations. *See, Berger, supra,* at 829-301.

justiciable political question because the state was under no compulsion to accept the benefits of the act;
(2) The state did not have *parens patric* standing to assert the rights of a citizen against the United States because in a federal-state dispute, it is the United States and not any given state that stands in *parens patrie* with its citizens; and
(3) The increased burden of taxation is a public rather than a private concern, and thus a citizen would not suffer any direct personal injury from an increase in taxation.

Similarly, a citizen would suffer no direct personal injury if the federal government usurps the sovereignty of a state. On the other hand, a citizen apparently does suffer a sufficiently personal injury to confer standing when he is taxed to support a religious institution, since each citizen has a personal stake in ensuring that the Government not establish a religion.

Lockhart, Kamisar and Choper go on to suggest that the taxpayer standing limitation is a practical measure to prevent undue interference with sensitive federal appropriations, especially in the fields of defense and foreign aid, but that such a limitation is not appropriate in the domestic arena of the Establishment Clause. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra*, at 68.

6. Cases after *Flast* (resurrection of the "case" or "controversy" Constitutional Consideration)

The Supreme Court's next foray into the morass may be found in a pair of cases decided in 1970: Association of Data Processing Service Organizations v. Camp, 397 U.S. 150; Barlow v. Collins, 397 U.S. 159. These cases involved the issue of standing to review administrative regulations.[17]

17. These are not the first cases on the subject, but rather, represent the current culmination of the law of standing in the administrative law field as it has evolved over an extensive period.

Data Processing Service begins with the observations that: "Generalizations about standing to sue are largely worthless as such." 397 U.S. at 151. Nevertheless, the Supreme Court stated that one generalization was necessary: "the question of standing in the federal courts is to be considered in the framework of Article III * * *." *Id.* This holds true whether the suit is by a taxpayer, as in *Flast*, or by a competitor, as in *Data Processing*. Mr. Justice Douglas, quoting from *Flast*, noted that the Article III requirement is met when the suit is "presented in an adversary context." He added that in a competitor's suit, the "first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.* at 152.[18] Second, where a party challenges regulatory actions, he will have standing to sue if he is arguably within the zone of interests protected by the statute. *Id.* at 155-156. If these two tests are met, a plaintiff will have standing to seek judicial review of an administrative determination only if Congress has not specifically forbidden such review. *Id.* at 156-158. *Barlow* restated and reinforced these tests. 397 U.S. at 164-165.[19]

7. Sierra Club v. Morton (The Personal Stake Requirement).

In Sierra Club v. Morton, —— U.S. —— (1972), the Supreme Court considered whether a private organization

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Note 17—*Continued*

See, e.g., Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1967); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939). *See also*, Chicago v. Atchison, T. & S.F.R. Co., *supra*.

18. The Court recognized that injury to non-economic interests reflecting " 'aesthetic, conservational, and recreational' * * * values" as well as a "spiritual stake in First Amendment values [may be] sufficient to give standing * * *." 397 U.S. at 154, citing Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-1006 (D.C. Cir. 1966); Abington School District v. Schempp, *supra*.

19. *See also*, Investment Company Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970).

had standing under the Administrative Procedure Act, 5 U.S.C. §702 (1970), to obtain judicial review of a decision of the United States Forest Service allowing development of part of a National Forest and National Game Refuge as a resort. Early in the opinion, the Supreme Court noted:

> "Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal' stake in the outcome of the controversy, *Baker v. Carr*, 369 U.S. 186, 204, as to ensure the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast v. Cohen*, 392 U.S. 83, 101." —— U.S. at ——, ——.

Justice Stewart, speaking for the majority, stated that *Data Processing* and *Barlow* held that standing existed under the A.P.A. where the plaintiffs "alleged that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." *Id.* at ——.

It is clear that the "injury in fact" need not be economic injury, yet it must be an injury suffered by the plaintiff and not the public at large. *See id.* at ——.[20] Only after a party establishes his personal standing may he litigate issues affecting the public interest. *Id.* at ——.

The policy reasons underpinning the *Sierra Club* holding, as expressed by the majority decision, indicate that the Supreme Court is not yet willing to allow "any individual citizen" to challenge executive or congressional action.

Mr. Justice Stewart went on to state:

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20. The dismissal of the complaint was affirmed because the Sierra Club had failed to allege that either it or its members would be directly affected by the change in use to which the land would be subject.

"The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Id.* at —— (Footnote omitted).

Because of the importance of environmental quality, Mr. Justice Blackmun would make an exception to this requirement. Id. at —— (Dissenting opinion).

The above catalog of authorities does not exhaust the list of cases in which standing was an issue. For example, as long ago as 1900 the Supreme Court insisted that only parties with an interest in the land could maintain an action bottomed on title to the land. *See* Tyler v. Judges of the Court of Registration, 179 U.S. 405. Standing requirements were somewhat relaxed in Truax v. Raich, 239 U.S. 33 (1915), to allow an employee to assert his employer's right to be free of an unconstitutional law restricting the employment of aliens. However, the plaintiff there was an alien employee, asserting rights under the Equal Protection Clause. In 1917, a Caucasian sued a Negro for specific performance of a real-estate contract; the Negro asserted a local ordinance restricting Negro residency; and the Caucasian was permitted to challenge the validity of the ordinance. Buchanan v. Warley, 245 U.S. 60 (1917); *accord*, Barrows v. Jackson, 346 U.S. 249 (1953). And in Pierce v. Society of Sisters, 268 U.S. 510 (1925), private and parochial schools were allowed to argue that a state statute violated the rights of parents and guardians because the plaintiff schools themselves had property rights directly affected by the statute.

In Ashwander v. TVA, 297 U.S. 288 (1936), a preferred stockholder of a private power company sued to prevent the company from entering into a contract with the TVA on the ground that the TVA was unconstitutional. Although the Supreme Court reached the merits of the case, Justice Brandeis, joined by Justices Stone, Roberts and Cardozo dissented on the ground Ashwander did not have standing since he had not demonstrated that either he or his company would sustain loss because of the contract. And three years later, in a similar situation, a majority of the Supreme Court held that the plaintiff did not have standing to attack the constitutionality of the TVA because it suffered no loss that could be remedied since it did not have a right to be free of competition. Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939).[21]

This past term, the Supreme Court, in Laird v. Tatum, 40 L.W. 4850, June 26, 1972, in deciding not to entertain the complaint of a citizen regarding claimed surveillance by Army authorities, stated:

> "The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. At the same time, however, these decisions have in no way eroded the 'established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show

21. Professor Bickel advances the rationalization that if a plaintiff suffers no injury either to a material right or one created by the law or the Constitution, then for a court to reach the merits of the controversy would be for it to render an advisory opinion. He concludes that this would be especially true in a taxpayer suit where the statute in question has no particular impact on the taxpayer. A. BICKEL, THE LEAST DANGEROUS BRANCH 121 (1962).

that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action . . .' Ex Parte Levitt, 302 U.S. 633, 634 (1937)." 40 L.W. at 4853

III. LOWER COURT CASES ON STANDING

There are some recent court of appeals and district court decisions which, although not binding upon us, shed some light on the problem. In Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), a taxpayer-citizen sued for a declaration that the Vietnam War was unconstitutional and for an order enjoining further American involvement in Vietnam. The district court dismissed the action and the court of appeals affirmed, holding that the plaintiff had not demonstrated the requisite personal stake in the outcome. The crux of the decision was that *Flast* was inapplicable because the plaintiff was not challenging a congressional expenditure under Article I, Section 8, and that even if *Flast* were applicable, no specific constitutional limitation had been violated.

In Richardson v. Kennedy, 313 F. Supp. 1282 (W.D. Pa. 1970) (three-judge court), *aff'd*, 401 U.S. 901 (1971), plaintiff challenged as unconstitutional the Congressional pay raise effected by the Postal Revenue and Federal Salary Act of 1967, 2 U.S.C. §§351-361 (1970). The Court dismissed the complaint on three grounds. First, the appropriation sought to be enjoined did not arise as in *Flast* under Article I, Section 8, but rather Article I, Section 6. Second, Article I, Section 6 "will not qualify as a Constitutional provision restricting the taxing and spending power ***." 313 F. Supp. at 1286. Third, the plaintiff did not "possess the necessary personal stake in the outcome of this controversy and therefore lacks standing to maintain this action." *Id.* (footnote omitted).

Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), reached an opposite result.[22] The plaintiffs, the Committee and individual reservists, sought an injunction ordering the executive to "take steps that will eliminate any office inconsistent with the constitutional mandate" of Article I, Section 6, clause 2, forbidding "Members of either House" from holding "any civil Office under the Authority of the United States." Specifically, it was alleged that 117 Senators and Representatives held commissions in the various military reserves, contrary to the Constitution. The court held that plaintiffs lacked standing as reservists, since they were unable to prove any direct injury, and as taxpayers, since they were not suing to enforce a limitation on the taxing and spending power of Congress. Nevertheless, Judge Gesell found that plaintiffs did have standing to sue as citizens for several reasons: (1) the Constitution was addressed "to the potential for undue influence rather than to its realization," 323 F. Supp. at 840; (2) the Constitutional clause sought to be enforced was a "precise self-operative provision," *id.*; (3) the Constitution intended to protect the interest shared by all citizens in maintaining independence among the branches of government, *id.* at 341; and (4) the adverse interests of the parties left no doubt as to the existence of a "case or controversy," *id.* Also important to the court was that if these plaintiffs could not obtain judicial review, "then as a practical matter no one can." *Id.*[23]

The standing of a citizen to attack the constitutionality of the Vietnam War was found to exist in another recent case. Atlee v. Laird, 339 F. Supp. 1347 (E.D. Pa. 1972). In *Atlee* the district court found that standing under the specific test of *Flast* was precluded because the warmaking

22. The order of the district court is presently pending appeal.

23. It is not without some significance that the district judge declined to grant injunctive relief and granted only a declaratory judgment. To our knowledge, the declaratory relief has never been implemented, which raises one of the problems that confronts a court in this type of a case.

clause was not a "specific limitation on the manner in which Congress could make expenditures." However, the court did find standing under the more general tests of *Flast*, *Data Processing Service*, and *Barlow* in that the plaintiffs had alleged personal economic injury resulting from the inflation and recession caused by war spending. The court also found standing because of the non-economic aspects of the war, *viz.*, the toll of human life, the threat to the personal safety and security of all the citizens, and the diversion of available funds from domestic needs to the war effort.[24]

IV. ANALYSIS OF DECISIONS

The principles to be distilled from all the many cases dealing with standing do not lead to the formulation of an easy set of guidelines by which standing may be determined, and indeed, Mr. Justice Douglas' comment in *Data Processing Service*, quoted *supra*, at ____, is particularly apt. The problem is compounded, not only by the various contexts in which the cases arose, but by their inconsistency with regard to their theoretical basis.[25] Nevertheless, some helpful guidelines do emerge from the mass of decisions.

The threshhold rule in determining standing to litigate is that the party raising the issue must have been personally and directly injured or threatened with immediate injury by a violation of a statutory or constitutional right designed to protect that party.

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24. Although Chief Judge Joseph Lord did not analyze the various cases involving suits by citizens attacking allegedly unconstitutional action, he did indicate that Atlee was alleging personal economic injury.

25. Of course it must be recognized that the doctrine of standing is properly a device by which courts avoid constitutional litigation when they deem it unnecessary or inappropriate to decide the underlying question. Thus, the inconsistencies can be explained in part by the fact that each standing decision is colored by unstated and perhaps undefinable premises.

See e.g., Laird v. Tatum, —— U.S. —— (1972); Sierra Club v. Morton, *supra*; Association of Data Processing Service Organizations v. Camp, *supra*; Barlow v. Camp, *supra*.

This element, however, is subject to certain exceptions or limitations. Thus, standing to litigate questions concerning the Establishment Clause might be found in the absence of direct injury.[26] *See e.g.*, Abington Township v. Schempp, *supra*; McGowan v. Maryland, *supra*. And slight injury may suffice to meet the test where other constitutional rights of paramount importance are at stake. *See* Baker v. Carr, *supra*; Sierra Club v. Morton, *supra* (Blackmun, J., dissenting); *cf.*, Flast v. Cohen, *supra*.

Another factor which becomes apparent is that standing requirements may be eased where the party asserting the constitutional right is a defendant in a criminal or civil action. *See* Griswold v. Connecticut, *supra*; NAACP v. Alabama, *supra*. The rationale for this approach appears to be three-fold; first, a defendant has been injured or threatened with injury because of the impact of the proceedings against him; second, a defendant is involuntarily in court, and thus the policy of discouraging litigation will not be furthered by preventing him from asserting the right; and third, for a court to convict or impose liability by virtue of an unconstitutional statue or action would be affirmatively to commit an unconstitutional act.

Next, suits designed to interfere with the orderly operation of the Government, particularly with regard to taxation and appropriations, will not be entertained except in narrowly-defined circumstances. *See* Flast v. Cohen, *supra*; Frothingham v. Mellon, *supra*; W. LOCKHART, Y. KAMISAR & J. CHOPER 68, *supra*.

Closely related to this principle is the admonition that a citizen who suffers equally with all other citizens will not

26. The personal injury requirement is also relaxed in most cases involving free speech or expression. *See* Note *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 102-103 (1960).

be heard to raise generalized grievances about the conduct of the Government. *See* Sierra Club v. Morton, *supra;* Flast v. Cohen, *supra;* Baker v. Carr, *supra;* Ex parte Levitt, *supra;* Frothingham v. Mellon, *supra;* Fairchild v. Hughes, *supra.*

One district court found an exception to this precept where the constitutional provision asserted was addressed to the potential for abuse, and the provision was precise and self-operative. Reservists Committee to Stop the War v. Laird, *supra.*

Finally, an important although not determinative factor in deciding whether standing exists is the availability of other modes of judicial review. *See* NAACP v. Alabama, *supra;* Barrows v. Jackson, *supra;* Pierce v. Society of Sisters, *supra;* Buchanan v. Warley, *supra;* Truax v. Raich, *supra. But see* Colgrove v. Green, *supra.*

In the quest for standing in this litigation, another analysis of the major Supreme Court cases may be undertaken. If one accepts the limitations read into Flast v. Cohen by Justices Stewart and Fortas, then Frothingham v. Mellon represents an absolute bar to predicating standing on plaintiff's status as a "taxpayer," absent allegations of expenditures in violation of the Establishment Clause, notwithstanding the somewhat broader language employed by the Court in *Flast.*

Thus, our inquiry here may be narrowly focused upon cases where "citizen" standing was asserted. This search can be further circumscribed by eliminating from consideration as inapposite cases brought under the Administrative Procedure Act, where Congress has authorized or at least not forbidden suits,[27] and cases in which standing was conferred upon *defendants*, where as noted above other factors apply.

By this process of elimination, there is left for consideration those cases dealing with the standing of "citi-

27. Although Richardson claimed entitlement to relief under the A.P.A., this claim is without merit, since the Act confers standing only upon persons "aggrieved by agency action within the meaning of a relevant statute * * *." 5 U.S.C. §702.

zens" who have sued a Government official for the vindication of a constitutional right personal to such "citizen." These cases fall into two categories. In some, the Supreme Court reached the merits despite the lack of a substantial, direct, tangible personal injury. In others, the standing barrier was breached only after the plaintiff demonstrated that he, personally, had actually been harmed in some regard.

Representative of the first group of cases are Baker v. Carr and Abington Township v. Schempp. In Baker v. Carr, the basis of standing was that the constitutional right asserted—the integrity of the electoral process—was considered of such paramount importance that the deprivation of the right by dilution of voting strength through unequal apportionment was deemed a sufficient injury to permit the merits to be adjudicated. Similarly, the consideration that led the Court in *Schempp* to by-pass the standing problem was the high value placed upon the rights encompassed by the Establishment Clause.

Cases representative of the second category—where plaintiff showed or failed to show harm in some regard—are Fairchild v. Hughes, Ex parte Levitt, Chicago v. Atchison, T. & S.F.R. Co., Laird v. Tatum, and Moose Lodge No. 107 v. Irvis. In *Fairchild* the Court stated that a citizen had no standing to challenge the adoption of the Nineteenth Amendment because he could not demonstrate any particular injury he would suffer that would not be shared equally by all citizens. *Levitt* held that a citizen did not have standing to challenge the appointment and confirmation of a Supreme Court Justice. And in *Atchison*, Parmelee was permitted to intervene because of the economic harm suffered by it. In *Tatum*, citizens attacking surveillance techniques employed by the Army were held not to have standing because there was no indication that their First Amendment rights were chilled by the Army's practices. On the other hand, the Supreme Court permitted the parties to litigate at least some of the issues in *Irvis* because the plaintiff demonstrated personal impact or injury. *Irvis* is an excellent example of this dichotomy. There, the Court

held that the plaintiff did not have standing to litigate questions involving the membership qualifications of the Moose Lodge because he had not even attempted to become a member, but that he did have standing to raise the issues surrounding the Lodge's guest policies since he was refused service while a guest.

Thus, through the use of this case-by-case evaluation, two criteria appear to be critical. Is the constitutional right asserted of such paramount importance so as to obviate the need to allege and prove direct, personal impact which is individualized as distinguished from an impact shared by every member of the body politic? If not, does the plaintiff allege a direct personal injury or impact caused by the violation of the asserted constitutional right?

V. APPLICATION OF PRINCIPLES TO THE PRESENT CASE

In this case, actual application of the precepts deduced from the various Supreme Court cases parallels the analysis undertaken above, and the same two questions must still be resolved.

We begin with the proposition that Richardson is a plaintiff, not a defendant, and therefore cases conferring standing upon defendants are somewhat inapplicable. Because expenditures are attacked, *Flast* and *Frothingham* would appear to create a barrier, at least insofar as Richardson's standing as a taxpayer is concerned. Third, the Administrative Procedure Act cases are not controlling because the challenged executive action is in full compliance with a Congressional enactment and there have been no administrative procedural irregularities pleaded. Finally, the plaintiff has not alleged that the Congressional and Executive action at issue has violated First Amendment rights or other rights previously assigned a position of paramount importance.

Accordingly, we are left with the questions of the relative importance of the asserted constitutional right and the nature of the injury suffered by the plaintiff.

1. Historical Background of Article I, Section 9, Clause 7

The debates regarding Article I, Section 9, Clause 7, the provision relied upon by plaintiff here, that occurred during the Constitutional Convention, shed light on the relative importance of that stipulation. An authority on the debates, Max Farrand, indicates that the discussion began with a statement by George Mason that "he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money." 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 326 (Rev. ed. 1966). James Madison disagreed only with Mason's proposal of a fixed reporting period, stating that reports based on short periods:

> "would not be so full and connected as would be necessary for a thorough comprehension of them and detection of any errors. But by giving them [the reporting officials] an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent." *Id.*

Rufus King objected to a full accounting on the ground that it would be "impracticable" to report "every minute shilling." 2 FARRAND 618.[28]

The argument that the duty to report the accounting runs to the public is based on a comparison of Article I, Section 9, Clause 7 with Article II, Section 3. The language of Article I, Section 9, Clause 7 mandates that "a regular Statement and Account * * * shall be published * * *", whereas Article II, Section 3 requires that the President "shall from time to time give to the Congress information

28. The importance of the accounting is emphasized when article I, Section 9, Clause 7, requiring disclosure of all receipts and expenditures, is compared with Article I, Section 5, Clause 3, which allows each House of Congress to except from publication in its journal "such Parts as may in their Judgment require Secrecy."

of the State of the Union * * *". Thus, the impact of the distinction between "shall be published" and "shall from time to time give to the Congress" becomes apparent. Furthermore, the Articles of Confederation, drafted by many of the same persons as the Constitution, required only that Congress inform the states of its indebtedness, as opposed to the requirement of publication of the receipt and expenditures of all public money. *Compare* U.S. CONST. Art. I., §9, cl. 7 *with* ARTICLES OF CONFEDERATION, Art. IX, ¶15 (requiring Congress to account to the states for "sums of money * * * borrowed or emitted").

2. Evaluation of Article I, Section 9, Clause 7 with respect to other constitutional provisions.

Nevertheless, without denigrating the importance of Article I, Section 9, Clause 7, it would appear fair to conclude that it does not rise to the paramount stature of other constitutional provisions, such as those contained in the Bill of Rights. History records that many of the early colonists came to the New World to avoid the inhibitions upon personal religious freedom which attend the establishment of a state church. Indeed, there is some doubt whether the Constitution would have been ratified at all without the promises of the draftsmen that it would be soon amended to provide for certain basic rights. It is no coincidence that the first clause of the First Amendment prohibits the establishment of a national religion.

The right of a citizen to have his vote count equally with those of other citizens is also basic to our system of Government. The "one-man-one-vote" principle is the very embodiment of the concept of a participatory democracy in which each citizen is considered the equal of every other.

Accordingly, the constitutional right presently asserted by the plaintiff would not appear to be, at least in the context of this case and at this point in the development of our history, of such pre-eminent importance that the traditional requirements of standing should be waived.

3. The nature of the injury.

Since the right asserted would appear to be not a paramount one, it is necessary to determine whether plaintiff has suffered a personal injury sufficient to enable him to litigate the underlying issue. Although the debates in the Constitutional Convention might suggest that the right conferred by Article I, Section 9, Clause 7 runs to each citizen individually, they also demonstrate that the Clause imposes a duty to report to the public generally. Because Richardson did not and could not allege that either he alone or some identifiable class of citizens has suffered an injury not suffered by everyone else, the conclusion would appear to follow that "he has merely a general interest common to all members of the public,"[29] and therefore is not endowed with standing to litigate this matter.

I recognize that if the view expressed herein were to be adopted by the majority, it would be difficult to perceive how a citizen would be able to litigate the constitutional provision asserted by Richardson. Nevertheless, the cumulative effect of the many cases denying standing in the face of this objection is persuasive authority that this consideration is not sufficient by itself, within the contours of this suit, to confer standing upon plaintiff.[30] *See, e.g.*, Frothingham v. Mellon, *supra;* Fairchild v. Hughes, *supra;* Ex Parte Levitt, *supra;* Coleman v. Miller, *supra* (Frankfurter, J., concurring).

Indeed, to create a deviation on this basis would risk impairment of a vital rule by the disintegrating erosion of particular exceptions.

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29. Ex Parte Levitt, *supra*.

30. The impact of this impediment is substantially blunted when it is considered that there are a number of constitutional provisions that cannot be litigated for other reasons. For example, the duty of a state to extradite a prisoner cannot be judicially enforced, Kentucky v. Dennison, 24 How. 66; the duty to ensure that laws are faithfully executed may not be judicially compelled, Mississippi v. Johnson, 4 Wall. 475; and violations of the guaranty of a republican form of government in the states is not assailable in the courts, Pacific Telephone Co. v. Oregon, 223 U.S. 118.

VI. CONCLUSION

In recent years, the Supreme Court has had several opportunities to expand the concept of standing, but has declined to do so. I have serious reservations whether we ought take this step in the absence of Congressional authorization or in the absence of some significant development in our national life clearly indicating the necessity for such movement.

The Constitution has been likened to a device designed "to be adapted to the various crises of human affairs." McCulloch v. Maryland, 4 Wheat, 316, 415 (1819). Constitutional litigation is the vehicle by which the Constitution can be interpreted, when necessary, to insure that the practice of government comports with the ideals of the governed. The system works best and provides a solid basis for future adjustments when changes are brought about slowly in response to real need for the change.

The rule of self-restraint did not develop suddenly, and it is not a manifestation of the timorousness of judges. Rather, it reflects an approach to constitutional litigation designed to avoid division among the three branches of Government in their task of social problem-solving. Before the Constitution was adopted, Alexander Hamilton, in the 78th FEDERALIST, recognized that the judiciary was the one branch without power to enforce its will on the other branches, and that it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The most respected jurists throughout our history have realized that rash decision-making by the courts could lead to the disregard of the judiciary as a decision-maker.

From Marbury v. Madison, 1 Cranch 137 (1803), to O'Brien v. Brown, U.S. ____ (1972), major constitutional crises threatening important government concepts have been averted by the application of discreet judicial techniques of self-restraint. When courts exercise forbearance, they act, to use the parlance of our electronic age, as filter circuits, dampening and smoothing political oscillations.

rather than as amplifiers, magnifying them out of proportion. It is this smoothing process that has enabled us, in the long run, to maintain our democratic ideals in a troubled world.

But to allow the tool of constitutional litigation to be employed at the behest of every disgruntled citizen would dull its working edge and weaken its effectiveness. It is for this reason that the Supreme Court has adopted a rule of "self-restraint," and it is for this reason that we should not be quick to abandon that precept.

Accordingly, I would affirm the judgment of the district court dismissing this action.

Judges Aldisert and Hunter join in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

C.A. No. 70-23

WILLIAM B. RICHARDSON, PLAINTIFF

v.

UNITED STATES OF AMERICA, DAVID M. KENNEDY, SECRETARY OF THE TREASURY FOR THE UNITED STATES, AND S. S. SOKOL, COMMISSIONER OF ACCOUNTS FOR THE SECRETARY OF THE TREASURY, UNITED STATES GOVERNMENT, DEFENDANTS

MEMORANDUM AND ORDER

WILSON, *Senior District Judge*

On January 8, 1970, William B. Richardson filed his complaint in which he named as defendants the United States of America; David M. Kennedy, Secretary of the Treasury; and S. S. Sokol, Commissioner of Accounts for the Secretary of the Treasury. The pro se complaint consists of some 56 numbered paragraphs.

In the complaint plaintiff gave a brief history relating to his contention that the Secretary of the Treasury and the Commissioner of Accounts in publishing the receipts and disbursements of the Government via the Bureau of Accounts failed to list monies expended in the operation of the Central Intelligence Agency. Plaintiff mentions letters to various departments and replies, the last of which is a reply from Mr. Sokol and quoted in part by the plaintiff as follows:

> "All the receipts and expenditures of the Government are published in the Secretary's reports; however, by statute, the details of

> receipts and expenditures for the above Agency (CIA) are not available."

Plaintiff says in his complaint that the action of the defendants as mentioned is contrary to Article 1, Section 9, Clause 7 of the Constitution of the United States, which reads:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Under the circumstances just recited and averred in the complaint in considerable detail, plaintiff avers as a member of the electorate, a citizen of the United States, and a Federal taxpayer that he is entitled to declaratory relief and a mandamus directing the defendants to publish expenditures of the CIA.

In the first instance, this complaint came before The Honorable John L. Miller for a decision as to whether on its face a Three Judge Court was appropriate. On January 16, 1970, Judge Miller denied the application for a Three Judge Court and directed that the Clerk make an assignment of the case in the usual manner. Thereafter on March 20, 1970, the defendants filed a motion to dismiss, and on April 22, 1970, filed a memorandum in support thereof. On May 19, 1970, plaintiff filed what he styled a motion to quash motion in opposition to convening a Three Judge Court and a motion to convene a Three Judge Court without further oral or written argument.

The parties have been heard at oral argument on the motion to dismiss and on plaintiff's contention

that he is nevertheless entitled to a Three Judge Court even though Judge Miller has denied his prior application.

On behalf of defendants, Thomas A. Daley, Assistant United States Attorney, first contends that the plaintiff lacks standing to bring this action. He has cited a prior case by this same plaintiff in *Richardson* v. *Sokol,* 285 F.Supp. 866 (W.D. Pa. 1968), which is affirmed in 409 F. 2d 3 (3rd Cir. 1969), cert. denied, 396 U.S. 949. Since those decisions, *Flast* v. *Cohen,* 392 U.S. 83 (1968), was announced by the Supreme Court. Under the cited decisions and considering Article I, Section 9, Clause 7 of the Constitution, the conclusion must be reached that plaintiff has no standing to bring this civil action.

But equally important to the decision is the contention of the Government that the complaint presents no justiciable controversy. Mr. Daley cites several statutes which create the CIA and regulate its expenditures: The National Security Act of 1947, 50 U.S.C. 403 as amended, and Section 6 of the Central Intelligance Agency Act of 1949, 50 U.S.C. 403(g) as amended. The publication of the details as to the funding of the activities of the CIA has been limited by Congress. Congress has done this in the interest of national security and national defense as well as foreign policy.

It is this Court's view that the subject matter complained of by plaintiff raises political questions in a governmental sense and the subject is not open to a United States District Court for adjudication in any manner.

ORDER

And now, June 16, 1970, for the reasons stated, the motion of the defendants must be and is granted, and this civil action is dismissed of record.

(S) JOSEPH P. WILLSON,
Senior District Judge.

cc: Wm. B. Richardson, 149 Westmoreland Ave., Greensburg, 15601, Thomas A. Daley, AUSA, 633 U.S. Courthouse, Pgh. 15219.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SHULTZ, Secretary of the Treasury; S. S. SOKOL, Commissioner of Accounts,

Petitioners,

—v.—

WILLIAM B. RICHARDSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union Foundation
22 East 40th Street
New York, N. Y. 10016

JAMES R. KELLEY
14 W. Pittsburgh Street
Greensburg, Penna. 15601

Attorneys for Respondent

IN THE

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Respondent does not challenge the formulation of the issue contained in the petition for certiorari (p. 2),[1] nor the statement of the case (pp. 2-6). Nor does he challenge the statement (p. 7) that the issue is important. But certiorari should be denied because the Court of Appeals' decision is consonant with settled decisions of this Court and does not conflict with any decisions by other courts of appeals.

1. The government urges that certiorari be granted because the decision of the court below "cannot be squared with this Court's decision in *Flast* v. *Cohen*, 392 U.S. 83, and goes far beyond the limited concept of standing there recognized" (p. 7). Specifically, the government asserts that respondent cannot demonstrate "a particular type of interest" in the challenged legislation, and therefore has

[1] All references are to the petition for certiorari.

no standing, because (1) "his suit is not directed at exercises of congressional power under the taxing and spending clause" (p. 8) and (2) "respondent cannot demonstrate . . . that the statute challenged exceeds a specific constitutional limitation of the congressional taxing and spending power" (p. 9).

The court below explicitly answered these claims in a way that satisfies the standards set forth by this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968).

As to the first, the majority of the court below held that respondent's claim

> . . . is integrally related to the appropriations process and the taxpayer's ability to challenge those appropriations. Although *Flast* recognizes standing of a taxpayer to challenge expenditures, how can a taxpayer make that challenge unless he knows how the money is being spent? Without accurate official information concerning the amount and purpose of the expenditures, there could be no basis for a taxpayer suit (p. 13a).

As to the second branch of the government's argument, the majority of the court below held that

> [w]hile article I, section 9, clause 7 is procedural in nature, and while the establishment clause is substantive in nature, both are nonetheless limitations on the taxing and spending power. It would be difficult to fashion a requirement more clearly conveying the framers' intention to regularize expenditures and to require public accountability (p. 14a).

Judge Adams, for the minority below, based his dissent on two grounds. First, he declared that the "constitutional right presently asserted by the plaintiff would not appear to be . . . of such pre-eminent importance that the traditional standing requirements should be waived" (p. 50a). This consideration, however, is nowhere to be found in *Flast* and cannot be said to be relevant to the standing problem. Each part of the Constitution is as important as every other, and we suggest that Judge Adams has confused preeminence with judicial visibility. The fact that the clause may not have been previously litigated means only that it has not heretofore been claimed to have been breached.[3] It does not mean it is not important.

Second, Judge Adams concluded that the respondent suffered no "personal injury sufficient to enable him to litigate the underlying issue" and that "he has merely a general interest common to all members of the public" (p. 51a). Judge Adams consequently acknowledges, as he must, that the constitutional provision at issue in this case could never be litigated.

But as the majority below noted, "[a] decision to deny standing to the [respondent] in these circumstances would not seem consistent with the limited scope of the standing requirement. See *Sierra Club* v. *Morton*, —— U.S. ——, ——, 40 U.S.L.W. 4397, 4401 (1972)."

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[3] The government asserts in its petition that "this clause [Art. I, Sec. 9, cl. 7] means only that no money can be paid from the Treasury unless first appropriated by Congress and reported in accord with that appropriation" (p. 9). This assertion is baseless. The three cases cited in support of it involved construction only of the phrase, "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law," but did not involve the phrase on which the respondent relies: "and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

In sum, there was a sound basis for the court below to conclude that respondent satisfies the two-pronged standing test enunciated in *Flast*. First, he is challenging the constitutionality of statutes which purport to alter the constitutional conditions governing the expenditure of public money. By definition this is a matter integrally related to the taxing and spending power. Second, the basis of respondent's challenge to these statutes is that they offend a specific constitutional limitation—one which unqualifiedly requires that public money shall not be expended without a public accounting.

Furthermore, in a democracy there can be no greater public good than full disclosure of governmental operations. Otherwise the public is not informed and citizens cannot properly perform their functions as voters. Cf. *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937). That was well understood by the Founding Fathers and led to the inclusion in the Constitution of the unequivocal command of Art. I, Section 9, clause 7. As the majority below correctly observed, unless a citizen and taxpayer has standing to invoke this provision it might just as well not be in the Constitution (p. 15a). When this Court permitted a taxpayer in *Flast* to challenge the use of federal moneys for a purpose allegedly violative of the First Amendment, it recognized that the time had come to abandon the old narrow view expressed in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923).

2. The government's contention (p. 10) that the decision below conflicts with other federal decisions is not correct. Not one of the cases cited in the petition presented a problem like the one in the case at bar.

In *Velvel* v. *Nixon*, 415 F.2d 236 (10th Cir. 1969), the suit sought a declaration that the conflict in Vietnam was unconstitutional since war had not been declared by Congress. But plaintiff in that case, a professor of constitutional law beyond draft age, obviously had no specific interest in the issue, whereas respondent citizen and taxpayer in the instant case has the specific interest in knowing what his government has done and is doing with the money raised by taxation so that he can exercise his functions as elector.

Troutman v. *Shriver*, 417 F.2d 171 (5th Cir. 1969), involved a challenge to the constitutionality of the Economic Opportunity Act of 1964 by bar associations and a taxpayer-citizen-lawyer, persons to whom the Act did not apply, who consequently were unable to show any injury to themselves.

Pietsch v. *President of the United States*, 434 F.2d 861 (2nd Cir. 1970), sought an injunction against collection of an income tax surcharge and a declaration that the Vietnam conflict was unconstitutional. The court of appeals upheld the dismissal of the complaint for failure to allege expenditures in violation of a specific constitutional prohibition. But in the case at bar respondent does challenge expenditures made in direct violation of the constitutional command that there be a public accounting.

Lamm v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971), sought to challenge a statute controlling outdoor advertising. Plaintiff purported to act on behalf of residents of Colorado, but had no interest affected by the challenged regulation and could not point to a specific constitutional prohibition.

It is difficult to understand petitioners' reference to *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176

(D.N.J. 1969). There the Court held that a state welfare board had standing to seek relief for welfare recipients and that the mothers of children receiving aid also had standing. It denied standing only to the director of the board suing as taxpayer because his challenge to the law did not rest on his status as taxpayer.

Finally, petitioners refer to an earlier case brought by respondent, *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa. 1970) which challenged statutory pay increases of federal employees on the ground that the law granting them violated the separation of powers. But there the decision rested on the district court's conclusion that the challenged expenditure did not stem from the taxing power and, therefore, plaintiff could not establish standing within *Flast*.

Not one of these cases touches on the standing of a citizen-taxpayer to challenge a violation of the direct command of the Constitution enacted for the benefit of all members of the public so that they should be properly informed of the activities of their government. Thus there is no conflict between the decision below and decisions of other lower federal courts on the threshold issue of respondent's standing to sue.

3. Furthermore, the court below has decided only the issue of standing and has remanded the case to a three-judge district court to consider the merits of respondent's claim that the statute exempting the budget of the Central Intelligence Agency from the requirements of Article I, Section 9, Clause 7 is unconstitutional. Accordingly, this case lacks finality, and that fact "of itself alone furnishe[s] sufficient ground for the denial [of] certiorari." *Hamilton-*

Brown Shoe Company v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *American Construction Co.* v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893).

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N. Y. 10016

JAMES R. KELLEY
14 W. Pittsburgh Street
Greensburg, Penna. 15601

Attorneys for Respondent

January 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SHULTZ, SECRETARY OF THE TREASURY; S. S. SOKOL, COMMISSIONER OF ACCOUNTS, PETITIONERS

v.

WILLIAM B. RICHARDSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–53a) is reported at 465 F. 2d 844. The opinion and order of the district court (Pet. App. B, pp. 55a–58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972. On October 11, 1972, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 17, 1972, and the petition was filed on December 15, 1972. This

Court granted the petition on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person has standing in his capacity as a federal taxpayer to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, Section 9, clause 7 of the Constitution, which generally provides for the publication of statements of expenditures of public money.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, clause 7 of the Constitution provides as follows:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

31 U.S.C. 1029 provides as follows:

> It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures by each separate head of appropriation.

The Central Intelligence Agency Act, 50 U.S.C. 403 *et seq.*, provides in pertinent part:

50 U.S.C. 403f(a):

> In the performance of its functions, the Central Intelligence Agency is authorized to—
>
> Transfer to and receive from other Government agencies such sums as may be approved by the Office of Management and Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a to 403c, 403e to 403h, and 403j of this title without regard to limitations of appropriations from which transferred; * * *

50 U.S.C. 403j(b):

> The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified.

STATEMENT

This suit was brought for the purpose of obtaining a declaration of unconstitutionality of provisions of the Central Intelligence Agency Act which provide that in the interests of national security, the annual financing of that agency shall not be made public. The complaint sought to require the Secretary of the Treasury to publish the details of C.I.A. appropriations in the "Combined Statement of Receipts, Expenditures, and Balances of the United States Government" required by 31 U.S.C. 1029 (App. 1–16).[1] The complaint alleged that the Act violated Article I, Section 9, clause 7 of the Constitution insofar as that clause requires a regular statement and account of public funds (App. 5).[2]

---

[1] 50 U.S.C. 403f(a) and 403j(b) authorize the C.I.A. to receive funds from other agencies and to expend those funds on the certification of the agency director. Congress found these provisions necessary to provide "for the annual financing of Agency operations without impairing security." S. Rep. No. 106, 81st Cong., 1st Sess., p. 4. Committees of Congress oversee agency financing, and approval by the Office of Management and Budget is necessary before other agencies may transfer funds to the C.I.A. Because funds are not appropriated directly to the agency, the Combined Statement which reports "expenditures by each separate head of appropriation" (31 U.S.C. 1029) does not reflect C.I.A. financing.

[2] The *pro se* complaint contains a variety of other, nonrelated allegations, *e.g.*, that the C.I.A. is "a para-military organization," that it "purchase[s] news reporting services," and that the vice-president has been "assigned to duties not prescribed by the Constitution" (App. 6, 15), all asserted to be in violation of various constitutional provisions. However, the complaint "primarily, and most prominently" attacks the Act's secrecy provisions (App. 5; see App. 9–15, 15–16). The other allegations were not pressed by respondent below and were not treated in the opinions of the courts below.

The plaintiff (respondent in this Court), William B. Richardson, alleged that he was a proper person to invoke the judicial process to decide these issues because he is "a taxpayer paying Federal income taxes and other Federal taxes" (App. 3).[3] The only specific injury respondent alleged was that he "cannot obtain a document that sets out the expenditures and receipts" of the C.I.A. but was "asked to accept a fraudulent document" (App. 5).

The district court refused to convene a three-judge court and dismissed the complaint, holding that respondent's allegations did not confer standing as a taxpayer under *Flast* v. *Cohen*, 392 U.S. 83 (Pet. App. B, pp. 55a–58a). The court of appeals, sitting *en banc*, reversed and remanded for a hearing by a three-judge court; three circuit judges dissented.[4]

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[3] Respondent also alleged that he was "a member of the electorate" as well as "a loyal citizen of the United States" (App. 3). However, the parties did not treat the issue of the standing of respondent as a citizen independently of his standing as a taxpayer, nor was the issue of citizen standing briefed in the lower courts, or discussed in detail in the court's opinions. See Pet. App. A, p. 13a, n. 8. Indeed, the *amicus* brief filed below on behalf of respondent at the request of the court of appeals questioned his standing as a citizen. See Brief at 14–15, n. 15. In any event, respondent stated that he "does not challenge the formulation of the issue contained in the petition for certiorari" which was limited to respondent's standing as a taxpayer. See Brief in Opposition in No. 72–885, p. 1.

The question of the standing of a citizen to challenge governmental action *qua* citizen is pending in *Richardson* v. *Reservists Committee to Stop the War*, No. 72–1188, certiorari granted, April 23, 1973.

[4] The case was initially argued before a panel consisting of two circuit judges and a district judge sitting by designation. After a second round of briefs, the court *sua sponte* determined

The court below held that respondent had standing as a taxpayer to challenge the constitutionality of the Central Intelligence Agency Act (Pet. App. A, pp. 10a–16a), under the criteria of *Flast* v. *Cohen*, *supra*.[5] The court understood the *Flast* test for determining whether a taxpayer has a sufficient adversary interest to give him standing as requiring that "(1) the plaintiff must establish a nexus between his status as a taxpayer and the challenged Government activity to give him a personal stake in the action; and (2) his claim must relate to a specific constitutional prohibition so that the issues may be sharpened and focused suffi-

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to hear the case *en banc* without further argument. The district judge on the original panel sat *en banc*. We believe this was improper, since, under 28 U.S.C. 46(c), the court *en banc* consists only of circuit judges in active service and any retired circuit judge who participated in the original hearing. Cf. *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 688–691. Indeed, the purpose of *en banc* decisions, to permit all active circuit judges to decide an important question that will control in the circuit (*id.* at 689–690), is inconsistent with permitting a district judge to participate in that process. We believe, however, that the error was harmless in this instance, since the district judge voted with the majority of five circuit judges. Although one of these five disagreed on the basis for the holding, the result without the district judge's vote would still have been the same.

[5] The court of appeals did not reach the district court's alternative ground for dismissing the complaint, that the method chosen by Congress for funding C.I.A. activities presented a political question; the court below concluded that the political question issue is so "intertwined with the merits of the case" that it should be considered by the three-judge court which it directed to hear the case on remand (Pet. App. A, p. 20a). The convening of the three-judge court has been stayed pending decision by this Court on the standing question.

ciently for proper judicial resolution" (Pet. App. A, p. 11a).

Considering the first part of the test, the court concluded that *Flast* was not limited to challenges to appropriations. Instead, it held that "[t]he personal stake may come from any injury in fact even if it is not directly economic in nature" (Pet. App. A, pp. 13a–14a), and concluded that the frustration of respondent's desire to know how his tax money is spent constituted such an injury.

The court further reasoned that the second part of the test in *Flast* was met, since, it believed, Article I, Section 9, clause 7 is a specific limitation upon the taxing and spending power of Congress, even though it recognized that the clause is not a substantive limitation but "is procedural in nature" (Pet. App. A, pp. 14a–15a).

After an extended analysis of the principles of standing as applied by this Court in particular cases (Pet. App. A, pp. 24a–44a), the three dissenting judges concluded that the relevant considerations for determining standing were as follows:

> * * * Is the constitutional right asserted of such paramount importance so as to obviate the need to allege and prove direct, personal impact which is individualized as distinguished from an impact shared by every member of the body politic? If not, does the plaintiff allege a direct personal injury or impact caused by the violation of the asserted constitutional right? [Pet. App. A, p. 48a.]

The dissenters concluded that unlike the right to liberty of conscience or to equal voice in the electoral process—at issue in the earlier cases relaxing standing requirements[6]—Article I, Section 9, clause 7 is not of such "pre-eminent importance that the traditional requirements of standing should be waived" (Pet. App. A, pp. 47a, 49a–50a). They also concluded that respondent did not allege a direct personal injury, but only shared a general public interest (Pet. App. A, p. 51a).

SUMMARY OF ARGUMENT

This Court has consistently required a party seeking judicial relief to allege facts which demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204. The requirement of such a specific interest is designed to insure that the issues will be presented "in an adversary context and in a form historically viewed as capable of judicial resolution," *Sierra Club* v. *Morton*, 405 U.S. 727, 732, and will involve something more than "generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen*, 392 U.S. 83, 106.

The court below concluded that a taxpayer has standing to litigate whenever he alleges any "injury in fact" stemming from an asserted violation of any constitutional provision "related to the appropriations process" (Pet. App. A, pp. 13a, 14a). That conclu-

[6] See *Flast* v. *Cohen*, 392 U.S. 83; *Baker* v. *Carr*, 369 U.S. 186.

sion cannot be squared with the decision of this Court in *Flast* v. *Cohen*, 392 U.S. 83, defining the limited circumstances in which status as a taxpayer gives standing to challenge a federal statute. That decision indicates that before a court can hear such a challenge, a plaintiff must make two showings. First, he must demonstrate a "logical nexus" between his status as a taxpayer and the statute he challenges. Second, he must show a nexus between his status and the "precise nature of the constitutional infringement alleged." 392 U.S. at 102. As the Court explained, that first test is satisfied only when a taxpayer challenges the constitutionality of Congress' exercise of its power under Article I, Section 8, clause 1 to tax and spend for the general welfare. The second test can be fulfilled, the Court held, only when the taxpayer relies on a clause of the Constitution that embodies a "specific" limitation upon "the exercise of the congressional taxing and spending power"—there, the Establishment Clause of the First Amendment. 392 U.S. at 102–103. If the plaintiff cannot make both showings in filing his lawsuit, he fails to demonstrate "the necessary stake as [a] taxpayer in the outcome of the litigation to satisfy Article III requirements." 392 U.S. at 102.

Respondent satisfies neither aspect of the required nexus carefully defined in *Flast*. He does not allege the unconstitutionality of any exercise of congressional power under the taxing and spending clause of Article I, Section 8. His complaint goes only to the procedures followed in appropriating and reporting expenditures, not to the constitutionality of the expenditures them-

selves. Thus, he asserts no interest in the expenditure of his tax moneys which would provide the logical or practical link between his status as a taxpayer and the legislative enactment attacked. Secondly, respondent's assertion that the Central Intelligence Agency Act is inconsistent with Article I, Section 9, clause 7 of the Constitution is not sufficient to meet the second branch of the test. That clause was not designed to be, and has never been interpreted as being, a limitation upon the congressional taxing and spending power. Instead, it establishes the procedures which the Executive Branch is to follow in accounting for the expenditure of funds appropriated by Congress. Even if respondent's assertion that the Act is inconsistent with this clause were correct, and even if a specific report of C.I.A. financing were constitutionally required, respondent has no direct and personal stake as a taxpayer in the enforcement of this clause.

ARGUMENT

RESPONDENT'S STATUS AS A TAXPAYER GIVES HIM NO STANDING TO CHALLENGE CONGRESSIONAL ACTION THAT DOES NOT INVOLVE EXPENDITURE OF HIS TAX DOLLARS FOR PURPOSES THAT VIOLATE A SPECIFIC CONSTITUTIONAL LIMITATION UPON THE TAXING AND SPENDING POWER

A. INTRODUCTION: THE TESTS FOR TAXPAYER STANDING UNDER *FLAST* V. *COHEN*

In *Flast* v. *Cohen*, 392 U.S. 83, this Court re-examined the question of the standing of a plaintiff, who alleges only his interest as a taxpayer, to invoke the jurisdiction of the federal courts in a challenge to the validity of an act of Congress. In *Frothingham* v.

Mellon, 262 U.S. 447, the Court had held that a taxpayer suing in that capacity alone lacked standing to contend that a federal spending program exceeded the bounds of national power.[1] As the Court noted in *Flast*, the decision in *Frothingham* had stood as "an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." 392 U.S. at 85. In reviewing the problem in *Flast*, the Court finally made clear that standing is one ingredient of "justiciability," the term of art that reflects the constitutional limits of the judicial power of the federal courts. Under Article III of the Constitution, the role of the federal judiciary is confined to the adjudication of "cases" and "controversies." Embedded in those terms are principles that limit "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast, supra*, 392 U.S. at 95. In addition, those words "define the role assigned to the ju-

[1] The Court in *Frothingham* reasoned (262 U.S. at 487): "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."

diciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.*

Applying these principles, the Court there concluded that the essence of standing is whether the plaintiff has "the personal stake and interest that impart the necessary concrete adverseness to such litigation" so that his invocation of the judicial process will be "consistent with the constitutional limitations of Article III." 392 U.S. at 101. The Court explicitly adhered to *Frothingham* in holding that there is no constitutional standing "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." 392 U.S. at 106. But, it was held, *Frothingham* should not be read as an absolute bar to taxpayer standing, since a taxpayer "may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case." 392 U.S. at 101.

In formulating the controlling test, applicable in the present case, for determining whether a taxpayer *qua* taxpayer has standing to maintain a particular suit, the Court insisted on a particular "nexus between the status asserted by litigant and the claim he presents * * *." 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the uncon-

> stitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. * * * Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. [392 U.S. at 102–103.]

The taxpayers in *Flast* established the "logical link" between their status as taxpayers and the enactment challenged, because the challenged programs (under the Elementary and Secondary Education Act of 1965) involved substantial amounts of federal tax funds being expended under the General Welfare Clause of Article I, Section 8. The Court considered the second aspect of the test satisfied by the assertion that the expenditure violated the Establishment Clause of the First Amendment, because the history of that Clause showed that it was specifically designed to prohibit the use of the federal taxing and spending power to aid religion. 392 U.S. at 104. The Court expressly reserved judgment on

whether there are *any other* clauses in the Constitution that could be considered "specific limitations" on the taxing and spending power sufficient for standing purposes.[4] Finally, the Court summarized the narrow exception to *Frothingham* being carved (392 U.S. at 105–106):

[4] Mr. Justice Stewart and Mr. Justice Fortas filed concurring opinions (392 U.S. at 114 and 115), expressing their views that *only* the Establishment Clause was a sufficiently specific limitation upon the congressional power to tax and spend to authorize taxpayer standing. Mr. Justice Fortas noted: "The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause." 392 U.S. at 116.

The lower federal courts, with the exception of the court below, have rejected claims that various other constitutional provisions besides the Establishment Clause constitute "specific limitations" upon the exercise of the taxing and spending power. *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa.), affirmed, 401 U.S. 901 (Art. I, § 6, cl. 1; compensation of members of Congress); *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042 (Art. I, § 8, cl. 11; war power); *Pietsch* v. *President of the United States*, 434 F.2d 861 (C.A. 2), certiorari denied, 403 U.S. 920 (same); *Lamm* v. *Volpe*, 449 F.2d 1202 (C.A. 10) (Tenth Amendment); see *Reservists Committee to Stop the War* v. *Laird*, 323 F. Supp. 833, affirmed, C.A.D.C., No. 71–1535, October 31, 1972, certiorari granted, No. 72–1188, April 23, 1973 (Art. I, § 6, cl. 2; no member of congress to hold executive office); *Atlee* v. *Laird*, 339 F. Supp. 1347 (E.D. Pa.), dismissed on other grounds by three-judge court, 347 F. Supp. 689 (Art. I, § 8, cl. 11; war power).

Various commentators have concluded that only the Establishment Clause constitutes a sufficiently specific limitation upon the power to tax and spend to permit taxpayer standing. Note, *Constitutional Law—Establishment Clause—Standing*, 57 Ill. Bar J. 236, 244 (1968); Note, *Constitutional Law—Federal Taxpayer's Standing to Challenge Constitutionality of Federal Statutes*, 17 Journal of Public Law 419, 424 (1968); Note, *Constitutional Law—Standing to Sue: What Remains of the Frothingham Rule?*, 48 Neb. L. Rev. 536, 540–552 (1969); Note, *Standing—Taxpayers Allowed to Challenge Federal Expenditures*, 42 Temple L. Q. 70, 75–76 (1968).

> * * * we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action [1] under the taxing and spending clause is [2] in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. * * *

As we shall now explain, respondent in the present case does not meet either of the tests established by *Flast* and thus he does not properly have standing to maintain this action in his capacity as a taxpayer.

B. BECAUSE RESPONDENT'S CHALLENGE IS DIRECTED TOWARD THE PROCEDURES FOLLOWED IN APPROPRIATING AND ACCOUNTING FOR TAX FUNDS, AND NOT TOWARD THE EXPENDITURE OF THOSE FUNDS FOR A CONSTITUTIONALLY IMPERMISSIBLE PURPOSE, HE HAS NOT SHOWN A SUFFICIENT NEXUS BETWEEN HIS STATUS AND THE CHALLENGED ENACTMENT TO GIVE HIM STANDING

Although respondent relies upon his status as a federal taxpayer, his suit is not directed at exercises of congressional power under the taxing and spending clause, Article I, Section 8, clause 1. Respondent does not rest his alleged standing as a taxpayer on claims that appropriations are being spent for constitutionally impermissible purposes.[9] On the contrary, he refers to the appropriation process only in the sense that he challenges the manner in which certain appro-

[9] Respondent's *pro se* complaint does suggest that the C.I.A. may be spending funds for such purposes as "purchas[ing] news reporting services" and that it is "a para-military organization" (App. 6). But the specific constitutional limitations that such activities may transgress are not clearly articulated. The court below did not treat any of those assertions as material to respondent's standing as a taxpayer since the focus of the lawsuit was seen to be the unavailability of a report on C.I.A. appropriations and expenditures.

priations are labelled and reported. As the court of appeals pointed out in its earlier dismissal of these allegations, *Richardson* v. *Sokol*, 409 F. 2d 3, 5 (C.A. 3), certiorari denied, 396 U.S. 1042, "[t]he appropriations per se are not a part of the 'matter in controversy.' Rather, appellant challenges only the propriety of the accounting procedure employed" (footnote omitted).[10] In the present proceedings, the court of appeals rejected this distinction, and instead extended *Flast* to regard "any injury in fact" related to the appropriations process as sufficient for purposes of taxpayer standing (Pet. App. A., p. 14a).

In *Flast*, however, this Court specifically stated that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. 1, § 8, of the Constitution," 392 U.S. at 102. The Court emphasized that taxpayer standing is limited to cases alleging unconstitutional expenditures by noting that allegations of "an incidental expenditure of tax funds in the administration of an essentially regulatory statute" would not be sufficient. In so holding, the Court explained that the test being formulated was "consistent with the limitation imposed * * * in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952)." 392 U.S. at 102. In *Doremus*, the Court dismissed a state

[10] Respondent's first complaint was dismissed for failure to allege or establish that the "matter in controversy" exceeded the $10,000 minimum necessary for jurisdiction under the "federal question" statute, 28 U.S.C. 1331(a). The court of appeals declined to reach the standing question on that appeal. The present suit was commenced under other jurisdictional statutes.

taxpayer's suit challenging bible reading in public schools, concluding that the

> taxpayer's action can meet this test [of standing under Article III], but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference * * * (*Doremus* v. *Board of Education*, 342 U.S. 429, 434).

The Court dismissed the appeal there because the taxpayers did not possess "the requisite *financial* interest that is, or is threatened to be, injured by the unconstitutional conduct." 342 U.S. at 435 (emphasis added).

Other federal courts have recognized the limited exception to *Frothingham* established in *Flast*, and have denied standing to taxpayers to challenge federal statutes and actions which do not involve expenditures under the taxing and spending clause, for where plaintiff "can claim no injury to his pocketbook by the statute * * * [he] has no standing as a federal taxpayer." *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176, 179 (D.N.J.) (three-judge court); see, also, denying taxpayer standing where expenditures made under other than Article I, Section 8; *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa.) (three-judge court), affirmed, 401 U.S. 901; *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042; cf. *Bradford* v. *Greene*, 440 F. 2d 265 (C.A.D.C.); compare *Protestants and Other Americans* v. *Watson*, 407 F. 2d 1264, 1265 (C.A.D.C.) (expenditure must be "substantial").

The court below nevertheless held that a taxpayer has standing to raise issues that do not involve contentions that the appropriation and expenditure of his money is being done for an invalid purpose. Instead, the court held: "The personal stake may come from any injury in fact even if it is not directly economic in nature" (Pet. App. A, p. 14a). The right claimed to be involved here—the right to be informed of the disposition of government funds—was held sufficient because it is "integrally related to the appropriations process" (Pet. App. A, p. 13a)." But it bears reitera-

" The court below found the necessary "logical link" between the enactment attacked and appellant's status as a taxpayer in its belief that, unless petitioner gets the information the statute makes secret, he will have no basis for challenging expenditures in a direct taxpayer suit of the sort authorized by *Flast* (Pet. App. A, p. 13a). This is, of course, a broadening of *Flast*, since it grants standing in situations where the taxpayer's interest is in discovering whether he has an interest of the sort identified in *Flast* as affording an assurance "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor" to present a justifiable challenge (*Flast*, *supra*, 392 U.S. at 106).

In such cases, the taxpayer is, we submit, in a situation more similar to the plaintiff in *Linda R. S.* v. *Richard D. et al.*, No. 71-6078, decided March 5, 1973, than to the taxpayer in *Flast*. In *Linda R. S.*, this Court held that the plaintiff, mother of an illegitimate child, had no standing to challenge the constitutionality of a state statute which, as applied, provided a criminal penalty for the failure of a father to support his legitimate children. Although a decision that the statute also applied to the fathers of illegitimate children might persuade the father of plaintiff's child to provide support, such a prospect was only speculative, and did not provide the necessary "'direct' relationship between the alleged injury and the claim sought to be adjudicated * * *." Slip op. 5. Similarly, here, the possibility that, if disclosed, the appropriations and expenditures of the CIA might provide information to the taxpayer on the basis of which he might wish to challenge the operations of the CIA, is too speculative to provide that relationship.

tion that we are concerned here with respondent's alleged standing *as a taxpayer*. As the dissenting judges pointed out, the obligation to publish a statement of account under Article I, Section 9, clause 7 is at most one owed "to the public generally" and petitioner has no special interest *as a taxpayer* which is affected by any possible failure to account (Pet. App. A, p. 51a). The fact that respondent pays taxes is irrelevant to his rights under clause 7; thus respondent has "merely a general interest common to all members of the public" which does not confer standing upon him. *Ex Parte Levitt*, 302 U.S. 633, 634; *Laird* v. *Tatum*, 408 U.S. 1, 13; *Sierra Club* v. *Morton*, 405 U.S. 727.[13]

In this case, where the target of respondent's suit is not the allegedly illegal expenditure of substantial amounts of federal revenue, there is simply not that kind of concrete adverseness and personal stake in the outcome that were held necessary in *Flast* to permit a taxpayer, suing only in that capacity, to invoke the federal judicial process. In setting forth the nub of a proper claim of taxpayer standing, the Court in *Flast* explained: "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."

[13] As Professor Davis has observed: "Even though the law of standing is so cluttered and confused that almost every proposition has some exception, *the federal courts have consistently adhered to one major proposition, without exception: One who has no interest of his own at stake always lacks standing.*" Davis, *Administrative Law Treatise*, 1970 Supplement, § 22.09–6, p. 753.

392 U.S. at 105–106. In this case, however, respondent's status as a taxpayer is in no way implicated by his suit; he is not complaining of illegal exaction of his taxes or even of illegal application of federal revenues. Whether his view of the public accounting question is right or wrong does not have any impact on him in his capacity as a taxpayer. Thus, to the extent that respondent is before this Court seeking to maintain his lawsuit solely in the role of a taxpayer, he must be regarded as having no precise and definable interest in the outcome of the question on the merits. Rather, he is claiming the mantel of taxpayer to "air his generalized grievances about the conduct of government" (392 U.S. at 106) when there is no real nexus between that status and the statutes he challenges.

In light of the constitutional dimension of the standing requirement, and its reflection of the allotment of functions among the various branches of the government, the result reached below is both unauthorized and unwise. The speculative "any injury" test created by the court below, which would sustain taxpayer standing so long as some grievance colorably related to the appropriation process is alleged, would disserve the policies established by Article III. It would inject the federal courts into consideration of virtually every imaginable question bearing on the constitutionality of the actions of the legislative and executive branches at the behest of a disgruntled "taxpayer" who wants to ventilate his opposition to some governmental program or procedure. There is no basis

in *Flast* v. *Cohen* for permitting this result, and no basis for repudiating the limitations carefully explained in *Flast* that bar respondent from maintaining this suit.

C. ARTICLE I, SECTION 9, CLAUSE 7 IS NOT A SPECIFIC LIMITATION UPON THE TAXING AND SPENDING POWER AND THEREFORE AN ALLEGATION OF ITS VIOLATION DOES NOT CONFER STANDING UPON A TAXPAYER

We have discussed above our reasons for contending that there is an inadequate nexus between respondent's status as a taxpayer and the nature of the congressional enactment he wants to attack. Respondent in addition fails to pass the second test for valid taxpayer standing.

The second aspect of the *Flast* test is that the taxpayer must establish that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." 392 U.S. at 102–103. The allegation that the funding of the Central Intelligence Agency Act is inconsistent with Article I, Section 9, clause 7 is not sufficient under this test.[13] Unlike the Establishment Clause, which *Flast* found to be a specific limitation on Congress (392 U.S. at 103–104), the Statement and Account Clause does not limit the congressional tax-

[13] Article I, Section 9, clause 7 provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

ing and spending power. Instead it is a limitation on the Executive Branch, requiring that money paid from the Treasury must first be appropriated by Congress, and that monies received and spent must be reported in accordance with appropriations. See, *e.g., Reeside* v. *Walker,* 11 How. 271, 290; *Knote* v. *United States,* 95 U.S. 149, 154; *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321.

Furthermore, this clause was not designed to secure the "right" that the court below found was at issue when it conferred standing on respondent—the right of a "responsible and intelligent taxpayer * * * to know how his tax money is being spent" (Pet. App. A, p. 14a). As we shall show, the purpose and scope of clause 7 do not support an individual taxpayer's right to satisfy his curiosity about the details of funding a sensitive federal agency on the ground that it falls within the "zone of interests to be protected" by that clause. *Sierra Club* v. *Morton, supra,* 405 U.S. at 733. Thus, respondent's status as a taxpayer does not authorize him to invoke the clause. The enforcement of this provision is left to the legislative and executive branches of the government.[11]

[11] The Court below apparently felt impelled to accord respondent standing, reasoning that if he "is not entitled to maintain an action such as this to enforce the dictate of article I, section 9, clause 7, * * * then it is difficult to see how this requirement * * * may be enforced at all" (Pet. App. A, p. 15a). This argument is unsupportable, for it proceeds on a premise that is at fundamental odds with Article III of the Constitution; it presupposes that every issue of implementation of the Constitution *must* be translated into a judicial question. That there may be *no* person who has a sufficiently direct, personal, and adverse interest in the outcome of a debat-

The history of the adoption of Clause 7 shows that it was "intended as a restriction upon the disbursing authority of the Executive department," *Cincinnati Soap Co.* v. *United States, supra,* 301 U.S. at 321, but allows Congress to decide how much of the reports from the Executive should be made public. In brief, the relevant materials show that, far from imposing an absolute limit on the power of Congress to tax and spend—necessary under *Flast* for taxpayer standing—the Framers of the Constitution wanted to assure by this clause that Congress could adequately monitor the Executive, while recognizing that "there might be some matters which might require secrecy." 3 Farrand, *The Records of the Federal Convention of 1787,* p. 326 (1911).

The Statement and Account Clause was not contained in the original draft of the Constitution; it was suggested from the floor during the final stages of the Convention, when George Mason moved to require an annual account of public expenditures. James Madison proposed to amend this motion to provide such reports "from time to time" in order to "leave enough to the discretion of the Legislature," and Madison's amendment was adopted. 2 Farrand, *supra,* at 618–619.

The debate between Mason and Madison was renewed in the Virginia convention in 1788, with Mason

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able constitutional question cannot be of use to a would-be plaintiff who lacks standing to sue. Rather, the absence of any adequate plaintiff would simply underscore the conclusion that the issue lacks the concreteness of a justiciable "case" or "controversy." As the dissent notes, there are a number of other constitutional provisions which can not be litigated (Pet. App. A, p. 51a, n 30).

opposing the language that Madison had proposed and the Constitutional Convention had adopted:

> The reasons urged in favor of this ambiguous expression, was, that there might be some matters which might require secrecy. In matters relative to military operations, and foreign negotiations, secrecy was necessary sometimes. But he [Mason] did not conceive that the receipts and expenditures of the public money ought ever to be concealed. * * * But that this expression was so loose, it might be concealed forever from them * * *.

3 Farrand, *supra,* at 326. Patrick Henry, another opponent of the provision as adopted, pointed out that

> * * * the national wealth is to be disposed of under the veil of secrecy; for [with] the publication from time to time * * * they may conceal what they may think requires secrecy. * * *

3 Elliot's *Debates on the Federal Constitution,* 462 (1836). As the debates make clear, the principal reason for modifying Mason's original language was to permit secrecy in matters which required it. Mason's view that public expenditures "ought [n]ever to be concealed" was rejected by the Framers, and the language which Patrick Henry felt would allow Congress to "conceal what they may think requires secrecy" ultimately prevailed.

Article I, Section 9, clause 7, relating to accounting for federal expenditures, does not in express terms authorize secrecy, as does Article I, section 5, clause 3, which provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the

same, except such Parts as may in their Judgment require Secrecy * * *." But the Framers, as discussed above, clearly contemplated secrecy of at least some reports of expenditures. Thus, Madison indicated that Congress could authorize secrecy in both cases:

> The congressional proceedings are to be occasionally published, including *all receipts and expenditures* of public money, of which no part can be used, but in consequence of appropriations made by law. This is a security which we do not enjoy under the existing system [the Articles of Confederation]. That part which authorizes the government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the [Articles of] confederation * * *. [3 Farrand, *supra*, 312.]

In addition, of course, it would be foolish to attribute to the Framers an intention to include in the Constitution an absolute obligation on the part of the Executive, enforceable at the suit of an individual taxpayer, to publicize every expenditure, even though the Constitution explicitly authorizes each House to keep secret its debates and decisions on these very matters.

The history of congressional understanding of the Statement and Account Clause shows that it has never been interpreted as preventing *Congress* from deciding (as it has in the Central Intelligence Agency Act) that certain narrow classes of federal expenditures should not be disclosed where delicate questions of foreign policy or military security are involved. Shortly after the Constitution was adopted, President Madi-

son (who had proposed the constitutional language) sent a confidential communication to Congress outlining his recommendation that he be authorized to take possession of parts of Spanish Florida. Congress then passed a secret appropriation act, appropriating one hundred thousand dollars for the occupation and forbidding the publication of the appropriation law. See Miller, *Secret Statutes of the United States*, Government Printing Office (1918); 3 Stat. 471–472. The statutes were not made public until 1818 when the controversy over Florida had ended.

More recently, Congress has found secrecy to be in the national interest in several settings. For example, over $2 billion was secretly expended on the Manhattan Project to develop the atomic bomb during World War II. See also statutes making confidential appropriations, *e.g.*, 28 U.S.C. 537 (F.B.I. expenditures); 31 U.S.C. 107 (Presidential expenditures for foreign intercourse); 42 U.S.C. 2017(b) (Atomic Energy Commission expenditures).

Congress has generally provided in 31 U.S.C. 66b(a) that the Secretary of the Treasury should regularly prepare reports on the financial operations of the government "for the information of the President, the Congress, and the public." The Court below relied on the fact that these reports are also intended for the benefit of "the public" (Pet. App. A, p. 9a). But the critical fact is that Congress has specifically directed in the Central Intelligence Agency Act, at issue here, that reports on the funding of that agency should remain confidential, and in so doing has exer-

cised what has been consistently regarded, since the foundation of the Republic, as a legitimate congressional prerogative.

Thus, in terms of the second branch of the *Flast* test for taxpayer standing, it must be recognized that neither the language of the Statement and Account Clause—which does not provide or imply that Congress may appropriate funds only if the appropriation and expenditure is publicly reported—nor its constitutional history imposes "specific constitutional limitations * * * upon the exercise of the congressional taxing and spending power * * *." 392 U.S. at 103.

Moreover, even to the extent that this clause bears upon the interest of the general populace in knowing how federal funds are being spent, there is no basis for enlarging the restrictions against taxpayer suits. The complaint makes no allegation that there has been a total refusal by Congress or the Executive to publish information about the federal budget or the state of the economy. All that is involved here is the attempt to keep confidential the funding of one sensitive agency, whose funds are accounted for among the expenditures charged to other departments.

In addition, respondent's interest in the details of C.I.A. funding—which, legally, is indistinguishable from the "interest" of millions of other persons similarly situated—hardly rises to the dignity of the constitutional right involved in *Flast*. Because First Amendment freedoms "need breathing space to survive," a broader concept of standing is appropriate

in that area. See *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433; *Abington School District* v. *Schempp*, 374 U.S. 203, 266–267, n. 30 (Brennan, J., concurring); Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y.U. L. Rev. 207, 226–227 (1963). In contrast with the core values involved in *Flast*, Article I, Section 9, clause 7 is a quiet and placid backwater, a provision rarely litigated and hardly central to the Constitution. This circumstance renders doubtful the occurrence of a substantial adversary interest, and makes inappropriate the extension of taxpayer standing to allow litigation under that clause.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with directions to affirm the district court's order dismissing the action for lack of standing by respondent to maintain it.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HARLINGTON WOOD, JR.,
Assistant Attorney General.
PHILIP A. LACOVARA,
Deputy Solicitor General.
HARRIET S. SHAPIRO,
Assistant to the Solicitor General.
WALTER H. FLEISCHER,
WILLIAM D. APPLER,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SCHULTZ, Secretary of the Treasury; S. S. SOKOL, Commissioner of Accounts,

Petitioners,

—v.—

WILLIAM B. RICHARDSON,

Respondent.

BRIEF FOR RESPONDENT

OSMOND K. FRAENKEL
120 Broadway
New York, N.Y. 10005

MELVIN L. WULF
JOHN H. F. SHATTUCK
BURT NEUBORNE
American Civil Liberties Union Foundation
22 East 40th Street
New York, N.Y. 10016

JAMES R. KELLEY
14 W. Pittsburgh Street
Greensburg, Penna. 15601

Attorneys for Respondent

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—v.—

William B. Richardson,

Respondent.

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the court of appeals (Pet. App. A, pp. 1a-53a) is reported at 465 F.2d 844. The opinion and order of the district court (Pet. App. B, pp. 55a-58a) are unreported.

Jurisdiction

The judgment of the court of appeals was entered on July 20, 1972. On October 11, 1972, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 17, 1972, and the petition was filed on December 15, 1972. This Court granted the petition on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Question Presented

Whether a person has standing in his capacity as a federal taxpayer to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, Section 9, clause 7 of the Constitution, which generally provides for the publication of statements of expenditures of public money.

Constitutional and Statutory Provisions Involved

Article I, Section 9, clause 7 of the Constitution provides as follows:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

31 U.S.C. 1029 provides as follows:

> It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures by each separate head of appropriation.

The Central Intelligence Agency Act, 50 U.S.C. 403 *et seq.*, provides in pertinent part:

50 U.S.C. 403f(a):

> In the performance of its functions, the Central Intelligence Agency is authorized to—
>
> Transfer to and receive from other Government agencies such sums as may be approved by the Office of Management and Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a to 403c, 403e to 403h, and 403j of this title without regard to limitations of appropriations from which transferred; • • •

50 U.S.C. 403j(b):

> The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified.

Statement

Respondent accepts the Statement in the brief for petitioners as substantially correct.

Summary of Argument

The doctrine of standing, as it has been developed by this Court has two aspects: "constitutional" standing required by the "case and controversy" provisions of the Constitution (Article III, section 2) and "discretionary" standing established as a matter of judicial self-restraint by this Court in order to avoid undue burden and to insure the proper presentation of issues. See *Data Processing Service* v. *Camp*, 397 U.S. 150 at 154.[1] Here plaintiff-respondent (hereafter designated simply as plaintiff) qualifies under both heads.

First, there is a clear Article III "case and controversy" with regard to the meaning and application of Article I, section 9 clause 7 of the Constitution and its impact on the statute which purports to exempt the CIA from the obligation of this provision of the Constitution, 50 U.S.C. 403j(b). The issue is being pressed in an adversary context because plaintiff has been refused information with regard to the expenditures by the CIA in reliance upon this statute.

Second, the self-imposed "discretionary" restraints should not be exercised here since the adversary posture

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[1] The dual nature of standing is discussed in Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 225, 302-303 (1961); Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353, 386-391 (1955). See generally, Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong. 2d Sess. 465, 467-468 (1966).

of the case and substantial interest of the plaintiff satisfies the most traditional notions of standing and, if the plaintiff is denied standing, there is no other person in a better position to raise the issue. That issue can be very simply framed: Can a citizen-taxpayer challenge a statute which, on its face, violates an express command of the Constitution intended to give to him and all other citizens the right to know how their government is spending its tax revenues?

ARGUMENT

I.

Plaintiff Has Met the Jurisdictional Requirement for Standing.

The first modern case to deal squarely with the question of standing in its constitutional aspect is *Baker* v. *Carr*, 369 U.S. 186 (1962). There the Court noted at page 204 that this requirement is met where there is "concrete adverseness which sharpens the presentation of issues." This was developed in *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968), where it was said: "in terms of Article III limitations the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form capable of judicial resolution." This was followed in *Data Processing*, 397 U.S. at 152. See also *Barlow* v. *Collins*, 397 U.S. 159, 164; *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45; *Eisenstadt* v. *Baird*, 405 U.S. 438, 443ff; *United States* v. *SCRAP*, 41 U.S.L.W. 4866 (June 18, 1973).

There can be no doubt that the constitutional requirements for standing are met in this case. The controversy is a concrete one and narrowly framed. Plaintiff claims that he cannot obtain from the Secretary of the Treasury a statement and account of the receipt and expenditures of the Central Intelligence Agency (App. 4-5). He cannot obtain this information because sections 403f(a) and j(b) of Title 50, U.S.C. remove from the Secretary the duty, otherwise imposed by statute [31 U.S.C. 1029], to provide the Congress annually with an "accurate combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys . . ." expended by the Central Intelligence Agency. The statement from which CIA expenditures are omitted is periodically published and available to taxpayers and citizens, including the plaintiff.

Plaintiff claims that the relevant sections of the Central Intelligence Agency Act violate his constitutional right, specifically granted to him by Article I, Section 9, Clause 7, to "a regular Statement and Account of the Receipts and Expenditures of all public Money . . ." and that he is thereby harmed in precisely the interest which the Clause is intended to protect. This substantial dispute, in which the parties are clearly adverse, is framed in a form traditionally capable of judicial resolution. Accordingly, the plaintiff and defendants herein are enmeshed in a classic "case and controversy" falling within the province of the judiciary.

II.

Plaintiff Has Met the Discretionary Requirements for Standing.

In addition to the minimum requirements of Article III standing, this Court has enunciated a rule of judicial self restraint which relieves the judiciary from expending judicial resources in the absence of an adversary proceeding in which the parties possess a "substantial" or "concrete" stake.

In *Data Processing*, 397 U.S. at 153 the Court described what it later called its "rule of self-restraint" (*id.* at 154) as "whenever the interest sought to be protected by the complainant is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." That requirement has been variously applied, depending largely on the particular circumstances of the case. Thus in *Flast, supra*, the taxpayer was held to have met this requirement because he was challenging the use to which his tax moneys were being put. But in *Abingdon School District* v. *Schempp*, 374 U.S. 203 (1963) it was held that a spiritual stake in First Amendment values was sufficient. In *Baker, supra*, and the many cases which have followed it, voters were given standing because the various apportionments they were challenging had the effect of diminishing the impact of their votes. In none of these cases was standing denied because of the relatively minor impact on the particular plaintiff.[2]

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[2] In *United States* v. *SCRAP, supra*, Mr. Justice Stewart noted the nature of the stake which this court has recognized as sufficient to confer standing when he quoted Professor Davis' formulation of standing with approval:

> The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a ques-

It is noteworthy that in all these cases the challenged action could not have been questioned at all had not persons situated as were the respective challengers been allowed standing. Obviously that is the situation here. This Court has recognized the force of this argument in other situations.

In *Barrows* v. *Jackson*, 346 U.S. 249 (1953) the Court held that a white party to a restrictive covenant had standing to challenge its validity as discriminatory against Negroes, since otherwise the validity might not be able to be tested at all, citing *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) and other cases at page 257.

In *NAACP* v. *Alabama*, 357 U.S. 449 (1958) the Court allowed an organization to raise a constitutional issue on behalf of its members.

In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) the Court discussed the standing of a book publisher to challenge restrictions on book sellers, saying in note 6 on page 65: "Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied."

Standing, indeed, has been denied in recent decisions of this Court only when it was evident that someone other than the litigating party could raise the constitutional issue. See *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Linda*

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tion of principle; the trifle is the basis for standing and the principle supplies the motivation. *United States* v. *SCRAP supra* at n. 14, quoting from Davis, *Standing: Taxpayers and Others*, 35 U. of Chi. L. Rev. 601, 613 (1968).

Of course, plaintiff's interest in obtaining information concerning the receipts and expenditures of the CIA is far more important to the functioning of the democratic process than the "identifiable trifles" discussed by Professor Davis.

R.S. v. *Richard D.*, 41 U.S.L.W. 4371 (March 5, 1973); and *Laird* v. *Tatum*, 408 U.S. 1 (1972).

In all those cases there were persons other than those before the court who could have raised the issues. Here, of course, that is not so.

Plaintiff has an interest, both as citizen-voter and as taxpayer, in knowing how CIA money was spent and if it was spent legally. Until the Secretary of the Treasury is required to file a Statement and Account of CIA expenditures, however, there will be no way to determine whether the CIA is acting pursuant to its statutory authority.

While the dissent and the majority below agreed that the right conferred by the Statement and Account Clause runs to the public, the dissent concluded that "the right asserted [is] not a paramount one," 465 F.2d 872. But all constitutional rights are important, and it is difficult to imagine a more fundamental right than that of a citizen and taxpayer to know and evaluate the spending policies of his government.

The government argues essentially that the plaintiff's injury is not sufficiently individualized for him to satisfy the standing requirements. Under this view if the government refuses to divulge its expenditures to only a particular group of citizens, they would have standing to sue; but if it infringes the constitutional rights of all taxpayers and citizens, they do not have standing.

This position was explicitly rejected by the Court in its decision this Term in *United States* v. *SCRAP*, *supra*. In *SCRAP* two environmental organizations had sued the Interstate Commerce Commission to enjoin certain increases in freight rates granted to the nation's railroads, on the

ground that the increases would discourage the use of recyclable materials and thereby have an adverse impact on the environment of the nation. In holding that the environmental organizations had standing to sue despite the fact that the injury they had alleged was extremely attenuated and shared equally by all members of the public, the Court pointed out that:

> . . . standing is not to be denied simply because many people suffer the same injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion. 41 U.S.L.W. at 4871.

Mr. Justice Stewart, writing for the majority went on to point out in a footnote that the degree of injury sufficient to give the plaintiff a personal stake in the controversy is minimal, especially in a case where all members of the public are equally affected by the challenged activity:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 41 U.S.L.W. at 4872 n. 14.[3]

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[3] To illustrate how minimal the plaintiff's injury might be, Mr. Justice Stewart pointed to several landmark decisions of this Court:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker* v. *Carr*, 369 U.S. 186; a five dollar fine and costs, see *McGowan* v. *Maryland*, 366 U.S. 420; and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663. . . .

III.

Plaintiff Also Meets the Requirements for Taxpayer Standing to Seek Judicial Enforcement of Specific Constitutional Requirements for the Exercise of the Taxing and Spending Power.

In *Flast* v. *Cohen*, 392 U.S. 83 (1968) this Court considered the question whether a taxpayer had standing to attack a federal statute on the ground that it violated the Establishment and Free Exercise Clauses of the First Amendment. The Court held that, as a matter of sound judicial policy, the taxpayer was an appropriate party to invoke federal judicial power because there was "a logical nexus between the status asserted and the claim sought to be adjudicated." 392 U.S. at 102. The nexus required for taxpayer's standing has two aspects to it:

> . . . First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, section 8 of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, section 8 . . . . 392 U.S. at 102-103.

As the majority below correctly recognized, the plaintiff in this case meets the two-prong test established in *Flast*: "(1) the plaintiff [has established] a nexus between his status as a taxpayer and the challenged Government activity to give him a personal stake in the action; and (2) his claim [relates] to a specific constitutional prohibition so that the issues may be focused sufficiently for proper judicial resolution." 465 F.2d at 851-52.

There is a logical link between plaintiff's status as a taxpayer and a statute which deprives him of fiscal information that the Constitution obligates the government to publish for his information and benefit. The Government argues, however, that *Flast* must be limited to challenges to appropriations, and that because plaintiff directly challenges the "procedures followed in appropriating and reporting expenditures, not . . . the constitutionality of the expenditures themselves," he cannot maintain standing to pursue his claim (Gov't Brief, at 9-10). This is an inadmissible distinction. It is the intimacy of the constitutional provision to the spending process that is relevant, not whether the limitation on the government is procedural or substantive.

If Congress undertakes to tax or spend pursuant to procedures which violate the conditions imposed by the Constitution, the defect is surely no less fundamental and the interest of the taxpayer no less vital than when funds are appropriated for a forbidden purpose. Suppose, for example, that the program in *Flast* had been defective because the President had failed to sign the enabling Act or because the bill appropriating funds for its administration had not originated in the House of Representatives. It would be anomalous to hold that such a fatal flaw was beyond correction but that the federal taxpayer might liti-

gate the much more elusive question of whether expenditures made pursuant to the program resulted in an undue involvement of church and state.

The *Flast* challenge, it must be remembered, was brought in the face of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), which had "stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interests of federal taxpayers" 392 U.S. at 85. The taxpayer in *Frothingham* had challenged federal grants to the states made pursuant to the Maternity Act of 1921, on the grounds that they violated the Fifth and Tenth Amendments to the Constitution. The Supreme Court held that the taxpayer had no standing to press her challenge because she did not rely on any specific limitation on the taxing and spending power of Congress. As the court observed in *Flast*, "The Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability" (392 U.S. at 105); while the Tenth Amendment protects only "the states' interest in their legislative prerogatives," and has nothing to do with taxpayers (392 U.S. at 105). Granting standing under these circumstances, therefore, might have opened up the federal courts to similarly "generalized grievances" of many other disgruntled taxpayers.

The plaintiff in this case, on the other hand, satisfies the two-part test enunciated in *Flast* which serves to protect the interests in sound judicial administration which concerned the Court in *Frothingham*. First, he is challenging the constitutionality of enactments by which Congress has sought to alter the conditions governing the expenditure of public money. By definition, this is a matter integrally

related to the taxing and spending power. Second, the basis of his challenge to these enactments is that they offend a specific constitutional limitation—one which unqualifiedly requires that public money shall not be expended without a public accounting.

IV.

While the Merits of Plaintiff's Challenge Are Not Now Before the Court, the Statement and Account Clause on Its Face Was Intended to Protect the Interests Plaintiff Is Asserting.

The government Brief, pp. 25-28 tries to denigrate this case by suggesting that the constitutional provision relied on is really not important and that, in any case, it was not intended to restrict the Congress. Plaintiff submits this is an indirect way of dealing with the merits of this case, which are not properly before the Court at this time. In any case, all that is necessary to establish standing is to show that the claim made is "arguably within the zone of interest to be protected . . . by the . . . constitutional guarantee in question." *Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. at 153. Some further observations about the history of Article I, section 9, clause 7 than is given in the government's brief are therefore appropriate.

During the Maryland debates on the Constitution, James McHenry spoke in favor of the constitutional provision at issue with these words: "The people who give their money ought to know in what manner it is expended." 3 Farrand, *The Records of the Federal Convention of 1787*, 150 (Rev. ed., 1966). From the very beginnings of the

Republic this duty has been generally recognized:[4] it was included in the Constitution itself and the constitutional provision at issue is presently implemented by 31 U.S.C. 1029.

At the Constitutional Convention, George Mason moved to require an annual account of public expenditures. Madison proposed to amend this motion to allow publication "from time to time," but only because it was believed that requiring publication at fixed intervals could lead to no publication at all, as had become the practice under the Articles of Confederation: "a punctual compliance being often impossible, the practice had ceased altogether." 2 Farrand, *The Records of the Federal Convention of 1787*; at 619.

During the Virginia debates on the Constitution, Mason expressed his belief that while some matters might require secrecy, ". . . he did not conceive that the receipts and expenditures of public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money." 3 *Elliot's Debates on the Federal Constitution* at 459.[5] When Mason voiced his concern that

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[4] By the second session of the 1st Congress, the Treasurer of the United States was providing quarterly accounts of public expenditures. 1 Annals of Congress 1031, 1061, 1141. As early as 1791, the House provided by resolution (2 Annals of Congress 302):

> RESOLVED: that it shall be the duty of the Secretary of the Treasury to lay before the House of Representatives . . . an accurate statement and account of the receipts and expenditures of all public moneys . . . in which statement shall also be distinguished the expenditures which fall under each head of appropriation, and shall show the sums, if any, which remain unexpended, and to be accounted for the next statement of each and every of such appropriations.

[5] Mason appears to have suggested, for example, that the details of diplomatic negotiations or military operations might be kept secret—at least while they were ongoing.

the requirement of publication from "time to time" might be too "loose," Lee replied that Mason's concern with the wording was "trivial"—that "[i]t must be supposed to mean, in the common acceptance of language, short, convenient periods"; and that "[t]hose who would neglect this provision would disobey the most pointed directions." 3 Elliot *supra*, at 459. Madison added that the purpose of allowing an accounting from "time to time" (rather than in short, prescribed periods) was to insure that the accounts would be ". . . more full and satisfactory *to the public*, and would be sufficiently frequent." 3 Elliot *supra*, at 460 (emphasis added). Madison's concern was clearly that more rather than less comprehensive reports be provided, contrary to the assertions of the government in its brief (pp. 24-25) and if he disagreed with Mason, it was solely over how to implement this goal.[8]

Furthermore, the text itself of the Statement and Account clause refutes the government's contention that the clause "allows Congress to decide how much of the reports from the Executive should be made public" (Gov't Brief at 23). The clause unequivocally states that "a regular

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[8] A letter from Madison to Edmund Pendleton on February 23, 1793 evidenced Madison's concern with irregularity and secrecy "in the administration of the Treasury Department." Hunt, *The Writings of James Madison*, Vol. VI, 123-25 (1906).

Patrick Henry's comment, that under the proposed language ". . . the national wealth is to be disposed of under a veil of secrecy; for [with] the publication from time to time . . . they may conceal what they may think requires secrecy," was *not* intended to approve of such a practice nor to suggest that the clause permitted it. Rather, and significantly, Henry disagreed with the phrase, "from time to time" not because it allowed Congress to "conceal what they think requires secrecy" but because the language allowed for *abuse* of the clear mandate and intent of the clause to require disclosure and prevent secrecy. 3 Elliot at 462. Gov't Brief, at 24.

statement and Account of the Receipts and Expenditures of *all* public Money *shall* be published from time to time" (emphasis added). By contrast, the Framers also wrote a constitutional provision which requires each House to maintain and publish a journal of proceedings, but excepts from the requirement of publication "such facts as *may in their Judgment* require Secrecy." Article I, section 5, Clause 3 (emphasis added). The difference between the provision calling for publication in the journal of proceedings and the provision directing publication by the Executive of all receipts and expenditures reflects Mason's view that while secrecy may sometimes be warranted, it is never warranted in the accounting of public money.[7]

In sum, the express constitutional command that a statement and account of the receipts and expenditures of all public money shall be published was anything but inadvertent. Indeed, the interests plaintiff asserts are not merely within the zone of interests sought to be protected by Article I, Section 9, clause 7 of the Constitution—they are the central interests which the Statement and Account clause was designed to protect.[8]

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[7] The Circuit Court majority found that the intent behind the Clause was that ". . . the citizenry should receive some form of accounting from the government. The use of the word 'published' emphasized their intention." 465 F.2d 850. The dissent fully agreed that the duty imposed ran to the public.

[8] The government's statement of the relevant history (Gov't Brief at 23-25) is both misleading and incomplete. The brief omits the following sentence in the quotation (p. 24) attributed to Mason after the word "concealed": "The people, he affirmed, had a right to know the expenditures of this money" (3 Farrand, 326; 3 Elliot Debates, 2d ed., 1836, 423). And Madison remarked that what should be published should include "all receipts and expenditures of public money. . . . This is a security which we do not enjoy under the existing system" (3 Farrand at 326). In the Elliot version (Vol. 3, p. 424) Madison is quoted as saying, "This pro-

V.

It Is Essential to Grant Plaintiff Standing in This Case in the Absence of Any Party Better Situated to Litigate His Important Constitutional Claim, Which Will Otherwise Be Forever Insulated From Judicial Scrutiny.

If standing is denied to the plaintiff in this case, the Court will have denied to every citizen and taxpayer the right to seek judicial enforcement of a constitutional provision that was specifically designed for their benefit and which is presently being violated.

It would be inconsistent with the obligations of this Court under Article III of the Constitution flatly to deny to all citizens the right to litigate a constitutional provision which the Framers considered "vital" for their protection. Mr. Chief Justice Marshall emphasized this point more than a century and a half ago:

> It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must

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vision went further than the Constitution of any state in the union, or perhaps in the world." And Richard Henry Lee of Virginia warned: "Those who would neglect this provision, would disobey the most pointed directions" (3 Elliot 423).

In New York, Chancellor Livingston reminded his hearers on June 27, 1788 "to keep in mind, as an important idea, that the accounts of the general government are 'from time to time' to be submitted to the public inspection . . . Will not the representatives consider it as essential to their popularity, to gratify their constituents with full and frequent statements of the public accounts. There can be no doubt of it" (2 Elliot 329).

The argument that Mason's view was rejected by the Convention is not supported by the circumstance that the reports could be made "from time to time" instead of annually and, as we have seen, Madison who proposed this change does not appear so to have viewed it.

take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. *Cohen* v. *Virginia*, 19 U.S. 264, 404, 6 Wheat. 291 (1821).

Both the majority and dissenting opinions below recognized that if standing were not granted to the plaintiff, the constitutional provision at issue could be violated with impunity and the violation never subjected to judicial review. Nevertheless, the dissent argued, courts have previously declined to grant standing even in the face of this objection. But the cases cited in support of this proposition can readily be distinguished from the instant case on other grounds, and in none of them did the Court close its doors forever to a concretely framed petition for the redress of a constitutional injury.

In *Sierra Club* v. *Morton, supra,* there were obviously "better" plaintiffs available to bring the action, and the

plaintiff there had claimed no injury to itself. In *Frothingham* v. *Mellon, supra,* the plaintiff did not claim an injury to a specifically protected constitutional interest of her own, nor could she personally claim more than an infinitesimal financial injury. Similarly, the circumstances in *Fairchild* v. *Hughes,* 208 U.S. 126 (1921), evinced a recognition from the Court that there were better parties to litigate the issue at hand than the citizen-plaintiffs. *Ex Parte Levitt,* 302 U.S. 633 (1937), on the other hand, involved a plaintiff who could show no direct, personal injury, and the constitutional provision invoked by him was not one which was specifically intended to grant rights to the public. Related difficulties existed in *Laird* v. *Tatum, supra,* where the Court determined that the plaintiffs had suffered no present injury and their claim was therefore not justiciable. The five-justice majority in *Laird* was also careful to point out that it would certainly protect the constitutional interests asserted when and if a direct and immediate violation of those interests could be demonstrated.

Nor have the lower federal courts denied standing to a plaintiff under circumstances similar to those in this case. In *Velvel* v. *Nixon,* 415 F.2d 236 (10th Cir. 1969), the plaintiff sought a declaration that the conflict in Vietnam was unconstitutional since war had not been declared by Congress. But plaintiff in that case, a professor of constitutional law beyond draft age, had no specific interest in the issue, whereas respondent citizen and taxpayer in the instant case has the specific interest in knowing what his government has done and is doing with the money raised by taxation so that he can exercise his functions as elector.

Pietsch v. *President of the United States,* 434 F.2d 861 (2d Cir. 1970), sought an injunction against collection of

an income tax surcharge and a declaration that the Vietnam conflict was unconstitutional. The Court of Appeals upheld the dismissal of the complaint for failure to allege expenditures in violation of a specific constitutional prohibition. But in the case at bar plaintiff does challenge expenditures made in direct violation of the constitutional command that there be a public accounting.

Lamm v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971) sought to challenge a statute controlling outdoor advertising. Plaintiff purported to act on behalf of residents of Colorado, but had no interest affected by the challenged regulation and could not point to a specific constitutional prohibition.

It is difficult to understand the government's reliance on *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176 (D.N.J. 1969). There the court held that a state welfare board had standing to seek relief for welfare recipients and that the mothers of children receiving aid also had standing. It denied standing only to the director of the board suing as taxpayer because his challenge to the law did not rest on his status as taxpayer.

Finally, the government relies on the decision in an early case brought by respondent, *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D.Pa. 1970), which challenged statutory pay increases of federal employees on the ground that the law granting them violated the separation of powers. But there the decision rested on the District Court's conclusion that the challenged expenditure did not stem from the taxing power and, therefore, plaintiff could not establish standing within *Flast*.

Not one of these cases touches on the standing of a citizen-taxpayer to challenge a violation of a direct command of the Constitution enacted for the benefit of all members of the public so that they should be properly informed of the expenditures of their government.

The constitutional and policy considerations underlying the doctrine of standing "do not insulate executive action from judicial review, nor [should they] prevent any public interests from being protected through the judicial process." *Sierra Club* v. *Morton*, 405 U.S. at 740. In short, they must not bar substantial constitutional claims from ever being heard, but should serve to insure that constitutional questions will be presented in a form most amenable to judicial resolution.

Here there is no reason to deny or postpone judicial consideration of plaintiff's claim. Plaintiff is presenting the court with a genuine dispute in an adversary context and in a form clearly capable of judicial resolution. He is claiming a continuing and direct injury to his interests as a taxpayer and citizen that are, at least arguably, "within the zone of interests" intended to be protected by the Statement and Account Clause (*Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. at 153); there is every assurance that plaintiff will pursue his claim vigorously and will "adequately represent the interests he asserts" (*Sierra Club* v. *Morton*, 405 U.S. at 758 (Blackmun, J., dissenting)); and there is no suggestion or likelihood that some other party would be better suited or situated to bring this claim. (*Id.*, 405 U.S. at 734-35.)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed, and the case remanded to the district court with instructions to take appropriate steps to designate a statutory three-judge court for adjudicating the merits of plaintiff's complaint.

Respectfully submitted,

Osmond K. Fraenkel
120 Broadway
New York, N.Y. 10005

Melvin L. Wulf
John H. F. Shattuck
Burt Neuborne
American Civil Liberties Union Foundation
22 East 40th Street
New York, N.Y. 10016

James R. Kelley
14 W. Pittsburgh Street
Greensburg, Penna. 15601

Attorneys for Respondent

Attorneys for Respondent acknowledge the assistance of Thomas H. Litwack, third year student at the New York University School of Law, in the preparation of this brief.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES ET AL. *v.* RICHARDSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-885. Argued October 10, 1973—Decided June 25, 1974

Respondent, as a federal taxpayer, brought this suit for the purpose of obtaining a declaration of unconstitutionality of the Central Intelligence Agency Act, which permits the CIA to account for its expenditures "solely on the certificate of the Director . . . ." 50 U. S. C. § 403 (j)(b). The complaint alleged that the Act violated Art. I, § 9, cl. 7, of the Constitution insofar as that clause requires a regular statement and account of public funds. The District Court's dismissal of the complaint for, *inter alia*, respondent's lack of standing under *Flast* v. *Cohen*, 392 U. S. 83, was reversed by the Court of Appeals. That court held that respondent had standing as a taxpayer on the ground that he satisfied *Flast's* requirements that the allegations (1) challenge an enactment under the taxing and spending clause of Art. I, § 8, and (2) a "nexus" between the plaintiff's status and a specific constitutional limitation on the taxing and spending power. *Held:* Respondent lacks standing to maintain this suit. Pp. 4–13.

(a) *Flast*, which stressed the need for meeting the requirements of Art. III, did not "undermine the salutary principle . . . established by *Frothingham* [v. *Mellon*, 262 U. S. 447] . . . that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" Pp. 4–7.

(b) Respondent's challenge, not being addressed to the taxing or spending power but to the statutes regulating the CIA's accounting and reporting procedures, provides no "logical nexus" between his status as "taxpayer" and the asserted failure of Congress to require more detailed reports of expenditures of the CIA. Pp. 8–9.

Syllabus

(c) Respondent's claim that without detailed information on the CIA's expenditures he cannot properly follow legislative or executive action and thereby fulfill his obligations as a voter is a generalized grievance insufficient under *Frothingham* or *Flast* to show that "he has sustained or is immediately in danger of sustaining a direct injury as the result" of such action. *Ex parte Lévitt*, 302 U. S. 633, 634. Pp. 9–12.

465 F. 2d 844, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, see No. 72–1188. STEWART, J., filed a dissenting opinion, in which MARSHALL, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 72–885

United States et al., Petitioners, v. William B. Richardson. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 25, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer [1] alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act, 63 Stat. 208, 50 U. S. C. § 403 *et seq.* (1970), violate Art. 1, § 9, cl. 7 of the Constitution which provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement of Account of the Receipts

[1] Respondent's complaint alleged that he was "a member of the electorate and a loyal citizen of the United States." At the same time, he states, in his brief in opposition to the petition for writ of certiorari, that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief in Opposition, p. 1. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution." Petition for certiorari, p. 2.

and Expenditures of all public money shall be published from time to time."

Respondent brought this suit in the United States District Court on a complaint in which he recites attempts to obtain from the Government information concerning detailed expenditures of the Central Intelligence Agency. According to the complaint, respondent wrote to the Government Printing Office in 1967 and requested that he be provided with the documents "published by the Government in compliance with Article I, section 9, clause (7) of the United States Constitution." The Fiscal Service of the Bureau of Accounts of the Department of the Treasury replied, explaining that it published the document known as the "Combined Statement of Receipts, Expenditures, and Balances of the United States Government." Several copies of the monthly and daily reports of the office were sent with the letter. Respondent then wrote to the same office and, quoting part of the CIA Act, asked whether this statute did not "cast reflection upon the authenticity of the Treasury's statement." He also inquired as to how he could receive further information on the expenditures of the CIA. The Bureau of Accounts replied stating that it had no other available information.

In another letter, respondent asserted that the CIA Act was repugnant to the Constitution and requested that the Treasury Department seek an opinion of the Attorney General. The Department answered declining to seek such an opinion and this suit followed. Petitioner's complaint asked the court to "issue a permanent injunction enjoining the defendants from publishing their 'Combined Statement of Receipts, Expenditures, and Balances of the United States Government' and representing it as the fulfillment of the mandates of

Article 5, section 9, clause 7 until same fully complies with those mandates." [2] In essence, the respondent asked the federal court to declare unconstitutional that provision of the Central Intelligence Agency Act which permits the Agency to account for its expenditures "solely on the certificate of the Director. . . ." 50 U. S. C. § 403j (b). The only injury alleged by respondent was that he "cannot obtain a document that sets out the expenditures and receipts" of the CIA but on the contrary was "asked to accept a fraudulent document." The District Court granted a motion for dismissal on the ground respondent lacked standing under *Flast* v. *Cohen*, 392 U. S. 83 (1968), and that the subject matter raised political questions not suited for judicial disposition.

The Court of Appeals sitting *en banc*, with three judges dissenting, reversed, 465 F. 2d 844 (1972), holding that the respondent had standing to bring this action.[3] The majority relied chiefly on *Flast* v. *Cohen*,

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[2] App. 15–16. Respondent's complaint also asked for a three-judge district court and this application was denied by a single district judge with directions to place the case on the calendar in the usual manner. The Court of Appeals, in the judgment under review, ordered that, on remand, the case be considered by a three-judge court. The District Court has granted a stay of respondent's motion to convene a three-judge court, pending disposition of this petition for writ of certiorari. On September 26, 1972, the Third Circuit denied a petition for mandamus, filed by respondent, to compel the immediate convening of a three-judge court.

[3] The majority found that the respondent had standing to bring this suit as a taxpayer. One judge held that he had standing as a citizen. This case was originally argued before a panel consisting of two Circuit Judges and one District Judge sitting by designation. After a second round of briefs, the court determined *sua sponte* to hear the case *en banc* without further argument. The District Judge sat *en banc* with the Court of Appeals. This point was not raised in the question presented of the petition for certiorari but the Solicitor General, in a footnote, called attention to the District

supra, and its two-tier test that taxpayer standing rests on a showing of (a) a "logical link" between the status as a taxpayer and the challenged legislative enactment, *i. e.*, an attack on an enactment under the taxing and spending clause of Art. I, § 8 of the Constitution; and (b) a "nexus" between the plaintiff's status and a specific constitutional limitation imposed on the taxing and spending power. 392 U. S., at 102–103. While noting that the respondent did not directly attack an appropriations act, as did the plaintiff in *Flast*, the Court of Appeals concluded that the CIA statute challenged by the respondent was "integrally related," 465 F. 2d, at 853, to his ability to challenge the appropriations since he could not question an appropriation about which he had no knowledge. The Court of Appeals seemed to rest its holding on an assumption that this case was a prelude to a later case challenging, on the basis of information obtained in this suit, some particular appropriation for or expenditure of the CIA; respondent stated no such an intention in his complaint. The dissenters took a different approach urging denial of standing principally because, in their view, respondent alleged no specific injury but only a general interest common to all members of the public.

We conclude that respondent lacks standing to maintain a suit for the relief sought and we reverse.

I

As far back as *Marbury* v. *Madison*, 1 Cranch 137 (1803), this Court held that judicial power may be exercised only in a case properly before it—a "case or con-

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Judge's participation. He expressed the view that, although 28 U. S. C. § 46 (c) limits *en banc* hearings to Circuit Judges in active service (and any retired Circuit Judge who participated in the initial hearing), see 28 U. S. C. § 46 (c), the error was harmless. N. 4, pp. 5–6, Petitioner's Brief. In these circumstances we need not reach the question.

troversy" not suffering any of the limitations of the political question doctrine, not then moot or calling for an advisory opinion. In *Baker* v. *Carr*, 369 U. S. 186, 204 (1969), this limitation was described in terms that a federal court cannot

> " 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39."

Recently in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970), the Court, while noting that "[g]eneralizations about standing to sue are largely worthless as such," 397 U. S., at 151, emphasized that "[o]ne generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Art. III which restricts judicial power to 'cases' and 'controversies.' "[4]

Although the recent holding of the Court in *Flast* v. *Cohen, supra*, is a starting point in an examination of respondent's claim to prosecute this suit as a taxpayer, that case must be read with reference to its principal predecessor, *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). In *Frothingham*, the injury alleged was that the congressional enactment challenged as unconstitutional would, if implemented, increase the complainant's future federal income taxes.[5] Denying standing, the

[4] 397 U. S., at 151. See also Davis, Administrative Law Treatise, 1970 Supplement § 22.09–6, p. 753.

[5] In *Frothingham*, the plaintiff sought to enjoin enforcement of the Federal Maternity Act of 1921, 42 Stat. 224 (1921), which provided for financial grants to States with programs for reducing maternal and infant mortality. She alleged violation of the Fifth

Frothingham Court rested on the "comparatively minute . . . remote, fluctuating and uncertain," *id.*, at 487, impact on the taxpayer, and the failure to allege the kind of direct injury required for standing.

> "The party who invokes the [judicial] power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*, at 488.

When the Court addressed the question of standing in *Flast*, Chief Justice Warren traced what he described as the "confusion" following *Frothingham* as to whether the Court had announced a constitutional doctrine barring suits by taxpayers challenging federal expenditures as unconstitutional or simply a policy rule of judicial self-restraint. In an effort to clarify the confusion and to take into account intervening developments, of which class actions and joinder under the Federal Rules of Civil Procedure were given as examples, the Court embarked on "a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits." 392 U. S., at 94. That re-examination led, however, to the holding that a "taxpayer will have standing *consistent with Article III* to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions *which operate to restrict the exercise of the taxing and spending power.*" (Emphasis supplied.) *Id.*, at 105–106. In so holding,

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Amendment's Due Process Clause on the ground tha the legislation encroached on an area reserved to the States.

the Court emphasized that Art. III requirements are the threshold inquiry:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . upon which the court so largely depends for the illumination of difficult constitutional questions.'" 392 U. S., at 99, citing *Baker* v. *Carr*, *supra*, at 204.

The Court then announced a two-pronged standing test which requires allegations: (a) challenging an enactment under the taxing and spending clause of Art. I, § 8 of the Constitution; and (b) claiming that the challenged enactment exceeds specific constitutional limitations imposed on the taxing and spending power. *Id.*, at 102–103. While the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers," *id.*, at 85, had been slightly lowered, the Court made clear it was reaffirming the principle of *Frothingham* precluding a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*, at 106. The narrowness of the *Flast* holding is emphasized by the concurring opinion of MR. JUSTICE STEWART, in *Flast:*

> "In concluding that the appellants therefore have standing to sue, we do not undermine the salutary principle, established by *Frothingham* and reaffirmed today, that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" [Citation omitted.] *Id.*, at 114.

II

Although the Court made it very explicit in *Flast* that a "fundamental aspect of standing" is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated," *id.*, at 99, it made equally clear that

> "in ruling on [taxpayer] standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102.[6]

We therefore turn to an examination of the issues sought to be raised by respondent's complaint to determine whether he is "a proper and appropriate party to invoke federal judicial power," *id.*, at 102, with respect to those issues.

We need not and do not reach the merits of the constitutional attack on the statute; our inquiry into the "substantive issues" is for the limited purpose indicated above. The mere recital of the respondent's claims and an examination of the statute under attack demonstrates how far he falls short of the standing criteria of *Flast* and how neatly he falls within the *Frothingham* holding left undisturbed. Although the status he rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power but to the statutes regulating the CIA, specifically 50 U. S. C. § 403j (b). That section provides different account-

[6] In some cases, the operative effect of this "look at the substantive issues" could lead to the conclusion that the "substantive issues" were nonjusticiable and in consequence no one would have standing. See *Gilligan* v. *Morgan*, 413 U. S. 1, 9 (1973); *Flast*, *supra*, at 95; *Poe* v. *Ullman*, 367 U. S. 497, 508–509 (1961).

ing and reporting requirements and procedures for the CIA, as is also done with respect to other governmental agencies dealing in confidential areas.[7]

Respondent makes no claim that appropriated funds are being spent in violation of a "specific constitutional limitation upon the . . . taxing and spending power . . . ." 392 U. S., at 104. Rather, he asks the courts to compel the Government to give him information on precisely how the CIA spends its funds. Thus there is no "logical nexus" between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency.[8]

The question presented thus is simply and narrowly whether these claims meet the standards for taxpayer standing set forth in *Flast;* we hold they do not. Respondent is seeking "to employ a federal court as a forum in which to air his generalized grievances about the conduct of the government." 392 U. S., at 106. Both *Frothingham* and *Flast, supra,* reject that basis for standing.

III

The Court of Appeals held that the basis of taxpayer standing

> "need not be the appropriation and spending of [Petitioner's] money for an invalid purpose. The personal stake may come from an injury in fact even

[7] See 28 U. S. C. § 537 (Federal Bureau of Investigation); 31 U. S. C. § 107 (foreign affairs); 42 U. S. C. § 2017 (b) (Atomic Energy Commission).

[8] Congress has taken notice of the need of the public for more information concerning governmental operations but at the same time it has continued traditional restraints on disclosure of confidential information. See: Freedom of Information Act, 5 U. S. C. § 552; *Environmental Protection Agency* v. *Mink,* 410 U. S. 73 (1973).

if it is not directly economic in nature. *Association of Data Processing Organizations, Inc.* v. *Camp*, supra, at 154." 465 F. 2d, at 853.[9]

The respondent's claim is that without detailed information on CIA expenditures—and hence its activities—he cannot intelligently follow the actions of Congress or the Executive, nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.

This is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the impact on him is plainly undifferentiated and "common to all members of the public." *Ex parte Lévitt*, 302 U. S. 633, 634 (1938); *Laird* v. *Tatum*, 408 U. S. 1, 13 (1972). While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering

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[9] The Court of Appeals thus appeared to rely on *Association of Data Processing Service Org.* v. *Camp*, *supra*, (1970). Abstracting some general language of that opinion from the setting and controlling facts of that case, the Court of Appeals overlooked the crucial factor that standing in that case arose under a specific statute. Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U. S. C. § 1861. The petitioner in *Data Processing* alleged competitive economic injury to private business enterprise due to a ruling by the Comptroller of the Currency permitting national banks to sell their data processing services to other banks and to bank customers whose patronage the data processing companies sought. We recognized standing for those private business proprietors who were engaged in selling the same kind of services the Comptroller allowed banks to sell; we held only that the claims of impermissible competition were "arguably . . . within the zone of interests protected," by § 4 of the Bank Service Corporation Act. 397 U. S., at 156. In short, Congress had provided competitor standing. The Court saw no indication that Congress had sought to preclude judicial review of *administrative rulings* of the Comptroller of the Currency as to the limitations Congress placed on national banks.

any particular concrete injury as a result of the operation of this statute. As the Court noted in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972),

> "a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id.*, at 739.

Ex parte Lévitt, supra, is especially instructive. There Lévitt sought to challenge the validity of the commission of a Supreme Court Justice who had been nominated and confirmed as such while he was a member of the Senate. Lévitt alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition of Art. I, § 6, of the Constitution.[10] The Court disposed of Lévitt's claim, stating:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he *has sustained or is immediately in danger of sustaining a direct injury* as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U. S., at 634. (Emphasis supplied.)

Of course, if Lévitt's allegations were true, they made out an arguable violation of an explicit prohibition of the

[10] "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; . . ."

Constitution. Yet even this was held insufficient to support standing because, whatever Lévitt's injury, it was one he shared with "all members of the public." The petitioner here, like the petitioner in *Lévitt*, also fails to clear the threshold hurdle of *Baker* v. *Carr*, *supra*, at 204, see *ante*, p. 5, and *Flast*, *supra*.[11]

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian

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[11] Although we need not reach or decide precisely what is meant by "a regular Statement of Account," it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest. It is therefore open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen. While the available evidence is neither qualitatively nor quantitatively conclusive, historical analysis of the genesis of cl. 7 suggests that it was intended to permit some degree of secrecy of governmental operations. The ultimate weapon of enforcement available to the Congress would, of course, be the "power of the purse." Independent of the statute here challenged by respondent, Congress could grant standing to taxpayers or citizens, or both, limited, of course, by the "Cases" and "Controversies" provisions of Art. III.

Not controlling, but surely not unimportant, are nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting. See 2 Farrand, The Records of the Federal Convention of 1787, 618–619; 3 Farrand, at 326–327; 3 Elliot's Debates 462. D. Miller, Secret Statutes of the United States, 10 (1918).

democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

As our society has become more complex, our numbers more vast, our lives more varied and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a "personal stake in the outcome," *Baker* v. *Carr*, *supra*, at 204 (1962), or a "particular concrete injury," *Sierra Club*, *supra*, at 740–741, n. 16, "that he has sustained . . . a direct injury . . . ." *Ex parte Lévitt* *supra*, at 634, in short, something more than "generalized grievances," *Flast*, *supra*, at 106. Respondent has failed to meet these fundamental tests; accordingly, the judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 72-885

United States et al., Petitioners, v. William B. Richardson. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 25, 1974]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court because I am in accord with most of its analysis, particularly insofar as it relies on traditional barriers against federal taxpayer or citizen standing. And I agree that *Flast* v. *Cohen*, 392 U. S. 83 (1968), which set the boundaries for the arguments of the parties before us, is the most directly relevant precedent and quite correctly absorbs a major portion of the Court's attention. I write solely to indicate that I would go further than the Court and would lay to rest the approach undertaken in *Flast*. I would not overrule *Flast* on its facts, because it is now settled that federal taxpayer standing exists in Establishment Clause cases. I would not, however, perpetuate the doctrinal confusion inherent in the *Flast* two-part "nexus" test. That test is not a reliable indicator of when a federal taxpayer has standing, and it has no sound relationship to the question whether such a plaintiff, with no other interest at stake, should be allowed to bring suit against one of the branches of the Federal Government. In my opinion, it should be abandoned.

I

My difficulties with *Flast* are several. The opinion purports to separate the question of standing from the merits, 392 U. S., at 99–101, yet it abruptly returns to

the substantive issues raised by a plaintiff for the purpose of determining "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102. Similarly, the opinion distinguishes between constitutional and prudential limits on standing. *Id.*, at 92–94, 97. I find it impossible, however, to determine whether the two-part "nexus" test created in *Flast* amounts to a constitutional or a prudential limitation, because it has no meaningful connection with the Court's statement of the bare minimum constitutional requirements for standing.

Drawing upon *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), the Court in *Flast* stated the "gist of the question of standing" as "whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" 392 U. S., at 99. As the Court today notes, *ante*, p. 7, this is now the controlling definition of the irreducible Art. III case or controversy requirements for standing.[1] But, as Mr. Justice Harlan pointed out

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[1] See also, *e. g.*, *Barlow* v. *Collins*, 397 U. S. 159, 170–171 (1973) (MR. JUSTICE BRENNAN, dissenting); Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 658 (1973). The test announced in *Baker* and reiterated in *Flast* reflects how far the Court has moved in recent years in relaxing standing restraints. In *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), for example, the Court declared that to permit a federal taxpayer suit "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 489. And in denying standing to citizens and taxpayers seeking to bring suit to invalidate the Nineteenth Amendment in *Fairchild* v. *Hughes*, 258 U. S. 126 (1922), the Court stated:

"It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case

in his dissent in *Flast*, 392 U. S., at 116 *et seq.*, it is impossible to see how an inquiry about the existence of "concrete adverseness" is furthered by an application of the *Flast* test.

Flast announced the following two-part "nexus" test:

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.*, at 102–103.

Relying on history, the Court identified the Establishment Clause as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8. *Id.*, at 103–105. On the other

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within the meaning of § 2 of Article III of the Constitution . . . ." *Id.*, at 129.

hand, the Tenth Amendment, and apparently the Due Process Clause of the Fifth Amendment, were determined not to be such "specific" limitations. The bases for these determinations are not wholly clear, but it appears that the Court found the Tenth Amendment addressed to the interests of the States, rather than of taxpayers, and the Due Process Clause no protection against increases in tax liability. *Id.*, at 105.

In my opinion, Mr. Justice Harlan's critique of the *Flast* "nexus" test is unanswerable. As he pointed out, "the Court's standard for the determination of standing [*i. e.*, sufficiently concrete adverseness] and its criteria for the satisfaction of that standard are entirely unrelated." *Id.*, at 122. Assuming that the relevant constitutional inquiry is the intensity of the plaintiff's concern, as the Court initially posited, *id.*, at 99, the *Flast* criteria "are not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.*, at 121. A plaintiff's incentive to challenge an expenditure does not turn on the "unconnected fact" that it relates to a regulatory rather than a spending program, *id.*, at 122, or on whether the constitutional provision on which he relies is a "specific limitation" upon Congress' spending powers. *Id.*, at 123.[2]

The ambiguities inherent in the *Flast* "nexus" limitations on federal taxpayer standing are illustrated by this

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[2] Mr. Justice Harlan's criticisms of the Court's analysis in *Flast* have been echoed by several commentators. *E. g.*, Scott, *supra*, at 660–662; Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 604–607 (1968). As Professor Scott notes, the *Flast* "nexus" test:

"can be understood as an expedient by a court retreating from the absolute barrier of *Frothingham*, but not sure of how far to go and desirous of a formula that would enable it to make case by case determinations in the future. By any other standard, however, it is untenable." 86 Harv. L. Rev., at 661.

case. There can be little doubt about respondent's fervor in pursuing his case, both within administrative channels and at every level of the federal courts. The intensity of his interest appears to bear no relationship to the fact that, literally speaking, he is not challenging directly a congressional exercise of the taxing and spending power. On the other hand, if the involvement of the taxing and spending power has some relevance, it requires no great leap in reasoning to conclude that the Statements and Accounts Clause, Art. I, § 9, cl. 7, on which respondent relies, is inextricably linked to that power. And that clause might well be seen as a "specific" limitation on congressional spending. Indeed, it could be viewed as the most democratic of limitations. Thus, although the Court's application of *Flast* to the instant case is probably literally correct, adherence to the *Flast* test in this instance suggests, as does *Flast* itself, that the test is not a sound or logical limitation on standing.

The lack of real meaning and of principled content in the *Flast* "nexus" test renders it likely that it will in time collapse of its own weight, as MR. JUSTICE DOUGLAS predicted in his concurring opinion in that case. 392 U. S., at 107. This will present several options for the Court. It may either reaffirm pre-*Flast*, prudential limitations on federal and citizen taxpayer standing; attempt new doctrinal departures in this area, as would MR. JUSTICE STEWART, *post*, p.——; or simply drop standing barriers altogether, as, judging by his concurring opinion in *Flast*, *supra*, and his dissenting opinion today, would MR. JUSTICE DOUGLAS.[3] I believe the first option to be the

[3] But see *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 18, 20-21 (1942) (MR. JUSTICE DOUGLAS, dissenting). MR. JUSTICE BRENNAN's view, see *post*, p. ——, that federal taxpayers are able to meet the "injury-in-fact" test that he articulated in *Barlow* v. *Collins*, 397 U. S. 159, 167–173 (1970), renders his position, for me at least, indistinguishable from that of MR. JUSTICE DOUGLAS. Fur-

appropriate course, for reasons which may be emphasized by noting the difficulties I see with the other two. And, while I do not disagree at this late date with the *Baker* v. *Carr* statement of the constitutional indicia of standing, I further believe that constitutional limitations are not the only pertinent considerations.

II

MR. JUSTICE STEWART, joined by MR. JUSTICE MARSHALL, would grant citizen or taxpayer standing under those clauses of the Constitution that impose on the Federal Government "as affirmative duty" to do something on behalf of its citizens and taxpayers. *Post*, pp. ——. Although he distinguishes between an affirmative constitutional duty and a "constitutional prohibition" for purposes of this case, *id.*, at —, it does not follow that MR. JUSTICE STEWART would deny federal taxpayer standing in all cases involving a constitutional prohibition, as his concurring opinion in *Flast* makes clear.[4] Rather, he would find federal taxpayer standing,

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thermore, I think that MR. JUSTICE BRENNAN has modified the standard he identified in *Barlow* by finding it satisfied in this case. It is a considerable step from the "distinctive and discriminating" economic injury alleged in *Barlow*, see *id.*, at 172, n. 5, to the generalized interest of a taxpayer or citizen, as MR. JUSTICE BRENNAN appears to have acknowledged in his opinion in that case. *Ibid.*

[4] In *Flast*, MR. JUSTICE STEWART based his concurrence in the majority's opinion on the view that the Establishment Clause constitutes an explicit prohibition on the taxing and spending power: "Because that clause plainly *prohibits* taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution. The present case is thus readily distinguishable from *Frothingham* v. *Mellon*, 262 U. S. 447, where the taxpayer did not rely on an *explicit constitutional prohibition* but instead questioned the scope of the powers delegated to the national legislature by Article I of the Constitution." 392 U. S., at 114. (Emphasis supplied.)

and perhaps citizen standing, in all cases based on constitutional clauses setting forth an affirmative duty and in unspecified cases where the constitutional clause at issue may be seen as a plain or explicit prohibition.

For purposes of determining whether a taxpayer or citizen has standing to challenge the actions of the Federal Government, I fail to perceive a meaningful distinction between constitutional clauses that set forth duties and those that set forth prohibitions.[5] In either instance, the relevant inquiry is the same—may a plaintiff, relying on nothing other than citizen or taxpayer status, bring suit to adjudicate whether an entity of the Federal Government is carrying out its responsibilities in conformance with the requirements of the Constitution? A taxpayer's or citizen's interest in and willingness to pursue with vigor such a suit would not turn on whether the constitutional clause at issue imposed a duty on government to do something for him or prohibited the government from doing something to him. Prohibitions and duties in this context are opposite sides of the same coin. Thus, I do not believe that the inquiry whether federal courts should entertain public actions is advanced by line drawing between affirmative duties and prohibitions.[6]

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[5] One commentator who espouses a broadening of standing in what he refers to as "public actions" apparently shares this difficulty. See L. Jaffe, Judicial Control of Administrative Action, c. 12, "Standing to Secure Review: Public Actions," at 484 (1965):

"[The ability of a taxpayer or citizen to bring a public action] should not depend on whether the questioned official conduct is of a positive or negative character, that is, whether it consists of an improper act or the failure to fulfill a duty."

[6] Such an approach might well lead to problems of classification that would divert attention from the fundamental question of whether public actions are an appropriate matter for the federal courts. And, if distinctions between constitutional prohibitions and duties are to make a difference, there are certain

In short, in my opinion my Brother STEWART's view fails to provide a meaningful stopping point between an all or nothing position with regard to federal taxpayer or citizen standing. In this respect, it shares certain of the deficiencies of *Flast*. I suspect that this may also be true of any intermediate position in this area. MR. JUSTICE DOUGLAS correctly discerns, I think, that the alternatives here as a matter of doctrine are essentially bipolar. His preference is clear: "I would be as liberal in allowing taxpayers standing to object to . . . violations of the First Amendment as I would in granting standing to people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights." *Flast* v. *Cohen*, 342 U. S., at 114 (concurring opinion). My view is to the contrary.

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to be some incongruous rules as to when such a public action may be brought. This is apparent when one attempts to categorise the provisions of the Constitution primarily addressed at limiting the powers of the national government—Art. I, § 9 and the Bill of Rights. All of the clauses of Art. I, § 9 except the seventh, which is at issue here, are stated as prohibitions. In fact the seventh clause is in part a prohibition against expenditures of public money in the absence of appropriations and in part an affirmative duty to publish periodically an account of such expenditures. The rationale for according special treatment solely to one-half of Art. I, § 9, cl. 7 and not to the other and not to the remaining clauses of Art. I, § 9, is not immediately apparent.

The same observation may be made of the Bill of Rights. The First through the Fifth, the Eighth, and possibly the Tenth Amendments are stated in terms of prohibitions. The Sixth and portions of the Seventh Amendments can be classified as duties. The Ninth defies classification. Rational rules for standing in public actions are, it seems to me, unlikely to emerge from an effort to make the format of a particular Amendment determinative.

III

Relaxation of standing requirements is directly related to the expansion of judicial power.[7] It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit at large oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.[8] Moreover, the argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been re-

[7] One commentator predicted this phenomenon and its possible implications at the outset of the past decade of dramatic changes in standing doctrine.

". . . . [J]udicial power expands as the requirements of standing are relaxed . . . . [I]f the so-called public action . . . were allowed with respect to constitutional challenges to legislation, then the halls of Congress and of the state legislatures would become with regularity only Act I of any contest to enact legislation involving public officials in its enforcement or application. Act II would, with the usual brief interlude, follow in the courts . . . ."

Brown, Quis Custodiet Ipsos Custodes—The School Prayer Cases, 1963 Sup. Ct. Rev. 1, 16.

[8] Cf. Bickel, The Least Dangerous Branch 122 (1962).

sponsible in large measure for the current drift toward expanded standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government. "We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missiouri, Kansas & Texas R. Co.* v. *May*, 194 U. S. 267, 270." *Flast* v. *Cohen*, 392 U. S., at 131 (Mr. Justice Harlan, dissenting).

Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government. Randolph's proposed Council of Revision, which was repeatedly rejected by the Framers, at least had the virtue of being systematic; every law passed by the legislature automatically would have been previewed by the judiciary before the law could take effect.[9] On the other hand, since the judiciary cannot

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[9] Randolph's Resolutions, also referred to as the Virginia Plan, served as the "matrix" for the document ultimately developed by the Constitutional Convention. See J. Goebel, I History of the Supreme Court of the United States, "Antecedents and Beginnings to 1801," at 204 (1971). The eighth of Mr. Randolph's 15 proposals was as follows:

"8. Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be

select the taxpayers or citizens who bring suit or the nature of the suits, the allowance of public actions would produce uneven and sporadic review, the quality of which

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again negatived by [an unspecified number] of the members of each branch."

I Farrand, The Records of Federal Convention of 1787, p. 21 (1911). See 1 Elliot's Debates 144 (1836). Madison ably supported the proposal, but it was defeated on three separate votes. 1 Farrand 140, 2 Farrand 71–72, 298.

The analogy between the proposed Council of Revision and unrestricted taxpayer or citizen standing is not complete. For example, Randolph proposed to link the judiciary directly to the executive, in large measure to enhance the executive and to protect it from legislative encroachments. See, *e. g.*, 1 Farrand, at 108, 138; 2 Farrand, at 74, 79. Thus, reliance on the Farmers' rejection of the Council must be approached with caution. Nevertheless, the arguments advanced at the Convention in support of and in opposition to the Council provide an interesting parallel to present contentions regarding unrestrained public actions. For example, Madison spoke of the " good" that would "proceed from the perspicuity, the conciseness, and the systematic character wch. the Code of laws wd. receive from the Judiciary talents." 1 Farrand, at 139. He declared that the proposal would be useful "to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form . . . ," *ibid.*, and that such a system would be "useful to the Community at large as an additional check" against unwise legislative measures. 2 Farrand, at 74. Those opposed to the proposal, including Gerry, Martin, and Rutledge, preferred to rely "on the Representatives of the people as the guardians of their Rights & interests." *Id.*, at 75. Judges were not presumed "to possess any peculiar knowledge of the mere policy of public measures. . . .," *id.*, at 73, or any "higher . . . degree" of knowledge of mankind and of "Legislative affairs . . . ." *Id.*, at 76. It was "necessary that the Supreme Judiciary should have the confidence of the people. . . ," id., at 76–77, and this would "soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislature." *Id.*, at 77. Moreover,

would be influenced by the resources and skill of the particular plaintiff. And issues would be presented in abstract form, contrary to the Court's recognition that "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury." *Sierra Club* v. *Morton*, 405 U. S. 727, 740–741, n. 16 (1972).[10]

The power recognized in *Marbury* v. *Madison*, 1 Cranch 137 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing. Were we to utilize this power as indiscriminately as is now being urged, we may witness efforts by the representative branches drastically to curb its use. Due to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform. But this has not always been the case, as experiences under the New Deal illustrate. The public reaction to the substantive due process holdings of the federal courts during that period requires no elaboration, and it is not unusual for history to repeat itself.

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the "Judges ought never to give their opinion on a law till it comes before them." *Id.*, at 80.

The arguments adduced at the Convention in opposition to the Council of Revision ultimately prevailed. I believe that analogous arguments should guide us in refusing as a general matter to entertain public actions.

[10] Some Western European democracies have experimented with forms of constitutional judicial review in the abstract, see *e. g.*, M. Cappelletti, Judicial Review in the Contemporary World 71–72 (1971), but that has not been our experience, and I think for good reasons. Cf. Bickel, *supra*, at 115–116.

Quite apart from this possibility, we risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

The considerations outlined above underlie, I believe, the traditional hostility of the Court to federal taxpayer or citizen standing where the plaintiff has nothing at stake other than his interest as a taxpayer or citizen. It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the judiciary into an open forum for the resolution of political or ideological disputes about the performance of government. See, *e. g.*, *Ex parte Levitt*, 302 U. S. 633, 634 (1937);[11] *Frothingham* v. *Mellon*, 262 U. S. 447, 488 (1923);[12] *Fairchild* v. *Hughes*, 258 U. S. 126, 129

[11] "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

[12] "The party who invokes the power [of the judiciary to declare a statute unconstitutional] must be able to show not only that the

(1922);[13] *Tyler* v. *Judges*, 179 U. S. 405, 406 (1900).[14] These holdings and declarations reflect a wise view of the need for judicial restraint if we are to preserve the judiciary as the branch "least dangerous to the political rights of the Constitution . . . ." Federalist No. 78.

To be sure standing barriers have been substantially lowered in the last three decades. The Court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing. *E. g.*, *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942); *Flast* v. *Cohen*, 392 U. S. 83, 130–133 (1968) (Mr. Justice Harlan, dissenting); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U. S. 205, 212 (1972) (MR. JUSTICE WHITE, concurring). Even in the absence of specific statutory grants of standing, economic interests that at one time would not have conferred standing have been reexamined and found sufficient. Compare *e. g.*, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970), and *Barlow* v. *Collins*, 397 U. S. 159 (1970), with, *e. g.*, *Tennessee Electric Power*

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statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

[13] "[Standing will be denied where a plaintiff] has only the right, possessed by every citizen, to require that Government be administered according to law and that the public moneys be not wasted."

[14] "Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens."

Co. v. *TVA*, 306 U. S. 118 (1939), and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938). See also *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U. S. 45 (1970). Non-economic interests have been recognized. *E. g., Baker* v. *Carr*, 369 U. S. 186 (1962); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). A stringently limited exception for federal taxpayer standing has been created. *Flast* v. *Cohen*, *supra*. The concept of particularized injury has been dramatically diluted. *E. g., United States* v. *SCRAP*, 412 U. S. 669 (1973).

The revolution in standing doctrine that has occurred, particularly in the 12 years since *Baker* v. *Carr*, *supra*, has not meant, however, that standing barriers have disappeared altogether. As the Court noted in *Sierra Club*, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U. S., at 738. Accord, *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).[15] Indeed, despite the diminution of standing requirements in the last decade, the Court has not broken with the traditional requirement that, in the absence of a specific statutory grant of the right of review, a plaintiff must allege some particularized injury that sets him apart from the man on the street.[16]

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[15] See, *ibid.*:

"Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (Footnotes omitted.)

[16] For example, as the Court noted in *Sierra Club*, *supra*, "if any group with a bona fide 'special interest' could initiate . . . litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to

I recognize that the Court's allegiance to a requirement of particularized injury has on occasion required a reading of the concept that threatens to transform it beyond recognition. *E. g., Baker* v. *Carr, supra; Flast* v. *Cohen, supra.*[17] But despite such occasional digressions, the requirement remains, and I think it does so for the reasons outlined above. In recognition of those considerations, we should refuse to go the last mile towards abolition of standing requirements that is implicit in broadening the "precarious opening" for federal taxpayers created by *Flast*, see 392 U. S., at 116 (Mr. Justice Fortas, concurring) or in allowing a citizen *qua* citizen to invoke the power of the federal courts to negative unconstitutional acts of the Federal Government.

In sum, I believe we should limit the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Flast* and *Baker* v. *Carr*. I think

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do so." 405 U. S., at 739–740. The clear implication is that allowing "any individual citizen with [a] . . . bona fide special interest" to trigger federal court litigation is a result to be avoided. All standing cases, even the most recent ones, include references to the need for particularized injury or similar language. None of them as yet has equated the interest of a taxpayer or citizen, suing in that status alone, with the particularized interest that standing doctrine has traditionally demanded. To take that step, it appears to me, would render the requirement of direct or immediate injury meaningless and would reduce the Court's consistent insistence on such an injury to mere talk.

[17] *Baker* v. *Carr* may have a special claim to *sui generis* status. It was perhaps a necessary response to the manifest distortion of democratic principles practiced by malapportioned legislatures and to abuses of the political system so pervasive as to undermine democratic processes. *Flast* v. *Cohen* may also have been a reaction to what appeared at the time as an immutable political logjam that included unsuccessful efforts to confer specific statutory grants of standing. See, *e. g.*, C. Wright, The Law of Federal Courts 40 (2d ed. 1970). Cf. 392 U. S., at 115–116 (Mr. Justice Fortas, concurring).

we should face up to the fact that *all* such suits are an effort "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen*, 392 U. S., at 106. The Court should explicitly reaffirm traditional prudential barriers against such public actions.[18] My reasons for this view are rooted in respect for democratic processes and in the conviction that "[t]he powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government." *Id.*, at 131 (Mr. Justice Harlan, dissenting).

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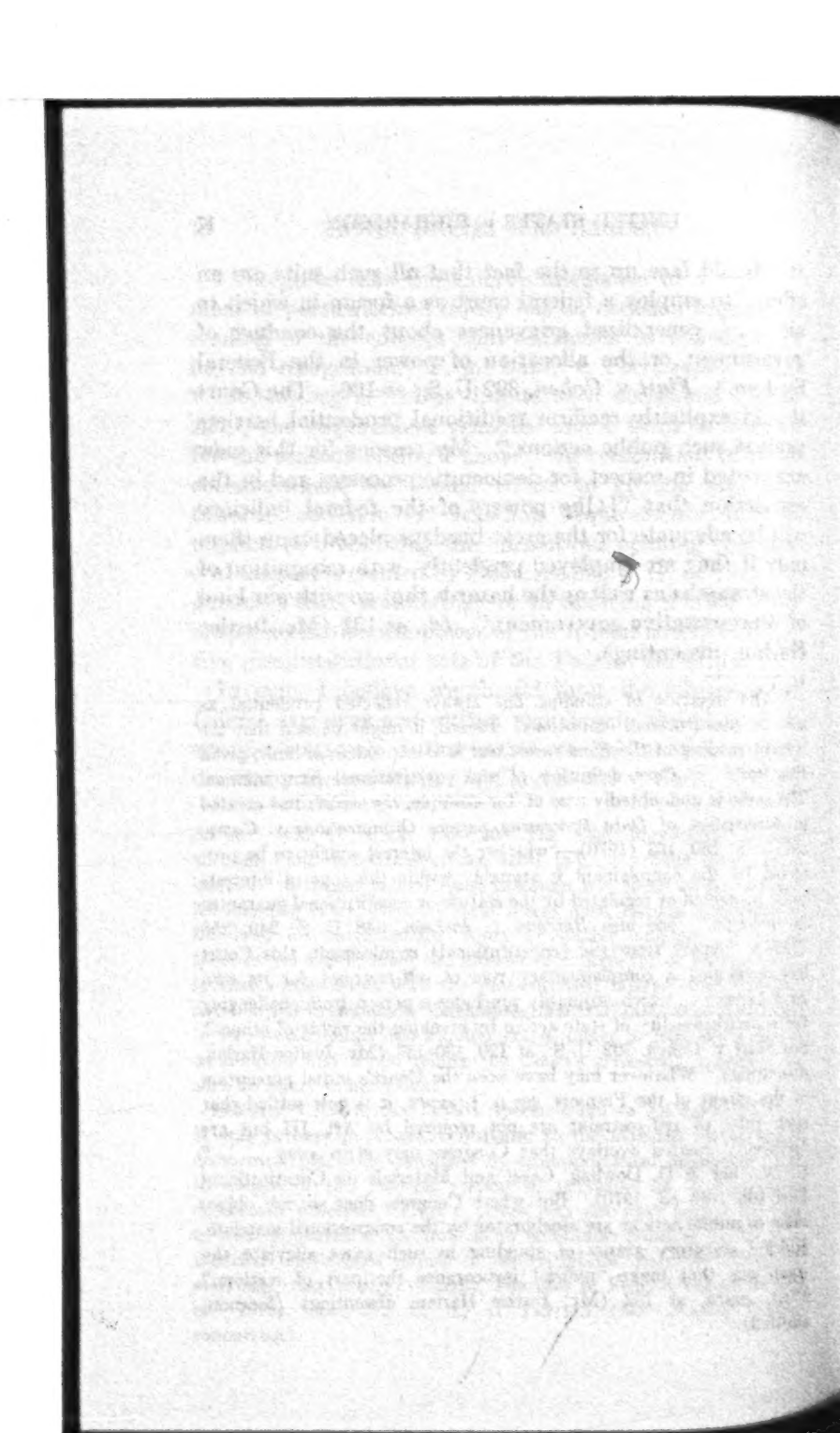
[18] The doctrine of standing has always reflected prudential as well as constitutional limitations. Indeed, it might be said that the correct reading of the *Flast* nexus test is as a prudential limit, given the *Baker* v. *Carr* definition of the constitutional bare minima. The same is undoubtedly true of, for example, the second test created in *Association of Data Processing Service Organizations* v. *Camp*, 397 U. S. 150, 153 (1970)—"whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." See also *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953): "Apart from the [constitutional] requirement, this Court has developed a complementary rule of self-restraint for its own governance . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others." See *Flast* v. *Cohen*, 392 U. S., at 120, 130–133 (Mr. Justice Harlan, dissenting). Whatever may have been the Court's initial perception of the intent of the Framers, see n. 1, *supra*, it is now settled that such rules of self-restraint are not required by Art. III but are "judicially created overlays that Congress may strip away . . . ." G. Gunther & D. Dowling, Cases and Materials on Constitutional Law 106 (8th ed. 1970). But where Congress does so, my objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make "judicial forbearance the part of wisdom." *Flast*, *supra*, at 132 (Mr. Justice Harlan, dissenting) (footnote omitted).



SUPREME COURT OF THE UNITED STATES

No. 72-885

United States et al., Petitioners, v. William B. Richardson. } On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 25, 1974]

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment of the Court of Appeals on the "standing" issue. My views are expressed in the *Schlesinger* case decided this day. There a citizen and taxpayer raised a question concerning the Incompatibility Clause of the Constitution which bars a person from "holding any Office under the United States" if he is a Member of Congress, Art. I, § 6, cl. 2. That action was designed to bring the Pentagon into line with that constitutional requirement by requiring it to drop "reservists" who were Members of Congress.

The present action involves Art. I, § 9, cl. 7 of the Constitution which provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

We held in *Flast* v. *Cohen*, 392 U. S. 83, that a taxpayer had "standing" to challenge the constitutionality of taxes raised to finance the establishment of a religion contrary to the command of the First and Fourteenth Amendments. A taxpayer making such outlays, we held, had sufficient "personal stake" in the controversy, *Baker* v. *Carr*, 369 U. S. 186, 204, to give the case the

"concrete adverseness" necessary for the resolution of constitutional issues. *Ibid.*

Respondents in the present case claim that they have a right to "a regular statement and account" of receipts and expenditures of public moneys for the Central Intelligence Agency. As the Court of Appeals noted, *Flast* recognizes "standing" of a taxpayer to challenge appropriations made in the face of a constitutional prohibition, and it logically asks, ". . . how can a taxpayer make that challenge unless he knows how the money is being spent?" *Richardson* v. *United States*, 465 F. 2d 844, 853.

History shows that the curse of government is not always venality; secrecy is one of the most tempting coverups to save regimes from criticism. As the Court of Appeals said:

> "The Framers of the Constitution deemed fiscal information essential if the electorate was to exercise any control over its representatives and meet their new responsibilities as citizens of the Republic; and they mandated publication, although stated in general terms, of the Government's receipts and expenditures. Whatever the ultimate scope and extent of that obligation, its elimination generates a sufficient, adverse interest in a taxpayer." *Ibid.* (Footnote omitted.)

Whatever may be the merits of the underlying claim, it seems clear that the taxpayers in the present case are not making generalized complaints about the operation of government. They do not even challenge the constitutionality of the Central Intelligence Agency Acts. They only want to know the amount of tax money exacted from them that goes into CIA activities. Secrecy of government acquires new sanctity when their claim is denied. Secrecy has of course some constitutional sanc-

tion. Art. I, § 5, cl. 3 provides that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ."

But the difference was great when it came to an accounting of public money. Secrecy was the evil at which Art. I, § 9, cl. 7 was aimed. At the Convention Mason took the intiative in moving for an annual account of public expenditures. 2 Farrand, The Records of the Federal Convention of 1787, p. 618. Madison suggested it be "from time to time," *id.*, 618–619, because it was thought that requiring publication at fixed intervals might lead to no publication at all. Indeed under the Articles of Confederation "[a] punctual compliance being often impossible, the practice had ceased altogether." *Id.*, at 619.

During the Maryland debates on the Constitution, James McHenry said, "[T]he people who give their money ought to know in what manner it is expended," 3 Farrand, *supra*, at 150. In the Virginian debates Mason expressed his belief that while some matters might require secrecy (*e. g.*, ongoing diplomatic negotiations and military operations) ". . . he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money." 3 J. Elliot, Debates on the Federal Constitution, p. 459. Lee said that the clause "must be supposed to mean, in the common acceptation of language, short, convenient periods" and that those "who would neglect this provision would disobey the most pointed directions." *Ibid.* Madison added that an accounting from "time to time" insured that the accounts would be "more full and satisfactory to the public, and would be sufficiently frequent." *Id.*, at 460. Madison thought "this provision went farther

than the constitution of any state in the Union, or perhaps in the world." *Ibid.* In New York, Livingston said, "Will not the representatives . . . consider it as essential to their popularity, to gratify their constituents with full and frequent statements of the public accounts? There can be no doubt of it," 2 Elliot, *supra*, at 347.*

From the history of the clause it is apparent that the Framers inserted it in the Constitution to give the public knowledge of the way public funds are expended. No one has a greater "personal stake" in policing this protective measure than a taxpayer. Indeed, if a taxpayer may not raise the question, who may do so? The Court states that discretion to release information is in the first instance "committed to the surveillance of Congress," and that the right of the citizenry to information under Art. I, § 9, cl. 7 cannot be enforced directly, but only through the "slow, cumbersome and unresponsive"

*Livingston used the proposed Art. I, § 9, cl. 7, to combat the idea that the new Congress would be corrupt. He said in part: "You will give up to your state legislatures everything dear and valuable; but you will give no power to Congress, because it may be abused; you will give them no revenue, because the public treasures may be squandered. But do you not see here a capital check? Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress. The gentleman admits that corruption will not take place immediately: its operation can only be conducted by a long series and a steady system of measures. These measures will be easily defeated, even if the people are unapprized of them. They will be defeated by that continual change of members, which naturally takes place in free governments, arising from the disaffection and inconstancy of the people. A changeable assembly will be entirely incapable of conducting a system of mischief; they will meet with obstacles and embarrassments on every side." 2 Elliot, *supra*, pp. 345–346.

electoral process. One has only to read constitutional history to realize that statement would shock Mason and Madison. Congress of course has discretion; but to say that it has the power to read the clause out of the Constitution when it comes to one or two or three agencies is astounding. That is the bare bone issue in the present case. Does Art. I, § 9, cl. 7 of the Constitution permit Congress to withhold "a regular statement and account" respecting any agency it chooses? Respecting all federal agencies? What purpose, what function is the clause to perform under the Court's construction? The electoral process already permits the removal of legislators for any reason. Allowing their removal at the polls for failure to comply with Art. I, § 9, cl. 7, effectively reduces that clause to a nullity, giving it no purpose at all.

The sovereign in this Nation are the people, not the bureaucracy. The statement of accounts of public expenditures goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs.

The resolution of that issue has not been entrusted to one of the other coordinate branches of government—the test of the "political question" under *Baker* v. *Carr*, *supra*, at 217. The question is "political" if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *ibid.* The mandate runs to the Congress and to the agencies it creates to make "a regular Statement and Account of the Receipts and Expenditures of all public Money." The beneficiaries—as is abundantly clear from the constitutional history—are the public. The public cannot intelligently know how to exercise the franchise unless they have a basic knowledge concerning at least the generality

of the accounts under every head of government. No greater crisis in confidence can be generated than today's decision. Its consequences are grave because it relegates to secrecy vast operations of government and keeps the public from knowing what secret plans concerning this or other nations are afoot. The fact that the result is serious does not of course make the issue "justiciable." But resolutions of any doubts or ambiguities should be towards protecting an individual's stake in the integrity of constitutional guarantees rather than turning him away without even a chance to be heard.

I would affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 72–885

United States et al., Petitioners, v. William B. Richardson. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 25, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court's decisions in *Flast* v. *Cohen*, 392 U. S. 83 (1968), and *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), throw very little light on the question at issue in this case. For, unlike the plaintiffs in those cases, Richardson did not bring this action asking a court to invalidate a federal statute on the ground that it was beyond the delegated power of Congress to enact or that it contravened some constitutional prohibition. Richardson's claim is of an entirely different order. It is that Art. I, § 9, cl. 7 of the Constitution, the Statement and Account Clause, gives him a right to receive, and imposes on the Government a corresponding affirmative duty to supply, a periodic report of the receipts and expenditures "of all public Money."[1] In support of his standing to litigate this claim, he has asserted his status both as a taxpayer and as a citizen-voter. Whether the Statement and Account Clause imposes upon the Government an affirmative duty to supply the information requested and whether that duty runs to every taxpayer or citizen are questions that go to the substantive merits of this liti-

[1] "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

gation. Those questions are not now before us, but I think that the Court is quite wrong in holding that the respondent was without standing to raise them in the trial court.

Seeking a determination that the Government owes him a duty to supply the information he has requested, the respondent is in the position of a traditional Hohfeldian plaintiff.[2] He contends that the Statement and Account Clause gives him a right to receive the information and burdens the Government with a correlative duty to supply it. Courts of law exist for the resolution of such right-duty disputes. When a party is seeking a judicial determination that a defendant owes him an affirmative duty, it seems clear to me that he has standing to litigate the issue of the existence *vel non* of this duty once he shows that the defendant has declined to honor his claim. If the duty in question involved the payment of a sum of money, I suppose that all would agree that a plaintiff asserting the duty would have standing to litigate the issue of his entitlement to the money upon a showing that he had not been paid. I see no reason for a different result when the defendant is a government official and the asserted duty relates not to the payment of money, but to the disclosure of items of information.

When the duty relates to a very particularized and explicit performance by the asserted obligor, such as the payment of money or the rendition of specific items of information, there is no necessity to resort to any extended analysis, such as the *Flast* nexus tests, in order to find standing in the obligee. Under such circumstances, the duty itself, running as it does from the defendant to the

[2] Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968). See Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L. J. 16 (1913).

plaintiff, provides fully adequate assurance that the plaintiff is not seeking to "employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast, supra,* at 106. If such a duty arose in the context of a contract between private parties, no one would suggest that the obligee should be barred from the courts. It seems to me that when the asserted duty is, as here, as particularized, palpable, and explicit as those which courts regularly recognize in private contexts, it should make no difference that the obligor is the government and the duty is embodied in our organic law. Certainly after *United States* v. *SCRAP*, 412 U. S. 669 (1973), it does not matter that those to whom the duty is owed may be many. "[S]tanding is not to be denied simply because many people suffer the same injury." 412 U. S., at 687.

For example, the Freedom of Information Act creates a private cause of action for the benefit of persons who have requested certain records from a public agency and whose request has been denied. 5 U. S. C. § 552 (a) (3). The statute requires nothing more than a request and the denial of that request as a predicate to a suit in the District Court. The provision purports to create a duty in the Government agency involved to make those records covered by the statute available to "any person." Correspondingly, it confers a right on "any person" to receive those records, subject to published regulations regarding time, place, fees, and procedure. The analogy, of course, is clear. If the Court is correct in this case in holding that Richardson lacks standing under Art. III to litigate his claim that the Statement and Account Clause imposes an affirmative duty that runs in his favor, it would follow that a person whose request under 5 U. S. C. § 552 has been denied would similarly lack standing under Art. III de-

spite the clear intent of Congress to confer a right of action to compel production of the information.

The issue in *Flast* and its predecessor, *Frothingham*, *supra*, related solely to the standing of a federal taxpayer to challenge allegedly unconstitutional exercises of the taxing and spending power. The question in those cases was under what circumstances a federal taxpayer whose interest stemmed solely from the taxes he paid to the Treasury "[would] be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the Constitutional limitations of Article III." 392 U. S., at 101. But the "nexus" criteria developed in *Flast* were not intended as a litmus test to resolve all conceivable standing questions in the federal courts; they were no more than a response to the problem of taxpayer standing to challenge federal legislation enacted in the exercise of the taxing and spending power of Congress.

Richardson is not asserting that a taxing and spending program exceeds Congress' delegated power or violates a constitutional limitation on such power. Indeed, the constitutional provision that underlies his claim does not purport to limit the power of the Federal Government in any respect, but, according to Richardson, simply imposes an affirmative duty on the Government with respect to all taxpayers or citizen-voters of the Republic. Thus, the nexus analysis of *Flast* is simply not relevant to the standing question raised in this case.

The Court also seems to say that this case is not justiciable because it involves a political question. *Ante*, at 12–13. This is an issue that is not before us. The "Question Presented" in the Government's petition for certiorari was the respondent's "standing to challenge the provisions of the Central Intelligence Agency

Act which provide that appropriations to and expenditures by that Agency shall not be made public on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution." [3] The issue of the justiciability of the respondent's claim was thus not presented in the petition for certiorari, and it was not argued in the briefs.[4] At oral argument, in response to questions about whether the Government was asking this Court to rule on the justiciability of the respondent's claim, the following colloquy occurred between the Court and the Solicitor General:

> "MR. BORK. . . . I think the Court of Appeals was correct that the political question issue could be resolved much more effectively if we were in the full merits of the case than we can at this stage. I think standing is all that really can be effectively discussed in the posture of the case now.
>
> . . . . . .
>
> "Q. . . . [I]f we disagree with you on standing, the government agrees then that the case should go back to the District Court?
>
> "MR. BORK. I think that is correct."

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[3] The Court has often indicated that, except in the most extraordinary circumstances, it will not consider questions that have not been presented in the petition for certiorari. *E. g., General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177–178 (1938); *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 357 n. 2 (1940); *Irvine* v. *California*, 347 U. S. 128, 129 (1954) (Jackson, J.); *Mazer* v. *Stein*, 347 U. S. 201, 206 n. 5 (1954).

[4] The District Court dismissed the complaint on the alternative grounds of lack of standing and nonjusticiability (because the court thought that the question involved was a political one). The Court of Appeals reversed the standing holding, but concluded that the justiciability issue was so intertwined with the merits that it should await consideration of the merits by the District Court on remand. The Government then brought the case here on petition for certiorari.

The Solicitor General's answer was clearly right. "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast, supra,* at 99–100.

On the merits, I presume that the Government's position would be that the Statement and Account Clause of the Constitution does not impose an affirmative duty upon it; that any such duty does not in any event run to Richardson; that any such duty is subject to legislative qualifications, one of which is applicable here; and that the question involved is political and thus not justiciable. Richardson might ultimately be thrown out of court on any one of these grounds, or some other. But to say that he might ultimately lose his lawsuit certainly does not mean that he had no standing to bring it.

For the reasons expressed, I believe that Richardson had standing to bring this action. Accordingly, I would affirm the judgment of the Court of Appeals.